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United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

vs.

B. W. ALEXANDER, et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 494

Upon Appeals from the District Court of the
United States for the District of Montana.

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

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United States for the District of Montana.

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OF RECORD.

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of Polson, Montana,

Attorney for Defendants and Appellees.

[1*]

In the District Court of the United States In and
for the District of Montana

No. 1529.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

B. W. ALEXANDER, et al.,

Defendants.

FLATHEAD IRRIGATION DISTRICT, et al.,

Intervenors.

Be It Remembered that on April 23rd, 1936, the
Plaintiff filed herein its Bill of Complaint which is
in the words and figures following, to wit: [2]

In the District Court of the United States
for the District of Montana
Missoula Division

No. 1529.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Defendants.

BILL OF COMPLAINT.

Comes now John B. Tansil, United States Attorney for the District of Montana, acting under and by authority of the Attorney General of the United States, brings this Bill of Complaint and alleges:

I.

That the defendants, B. W. Alexander, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil

C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis, J. A. McKeever, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald are citizens of the United States and the State of Montana, and that they reside within the confines of the Flathead Indian Reservation in Montana. That the Beckwith Mercantile Company is a corporation created, organized and existing under and by virtue of the laws of the State of Montana.

II.

That by virtue of a treaty between the United States of America and the confederated tribes of Flathead, Kootenai and Upper Pend D'Oriellis Indians made July 16, 1855 (12 Stat. 975), ratified [3] March 8, 1859, by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859, the confederated tribes ceded, released and conveyed to the United States all their right, title and interest in and to a large portion of the country then occupied or claimed by them, being in what is now the north-western part of the State of Montana, and the United States set aside and then reserved for the exclusive use, benefit and occupancy of the said confederated tribes and as a general Indian reservation, upon which might be placed other friendly tribes and bands of Indians, a part of the land so ceded and relinquished, which part so set aside and reserved as an Indian reservation is designated and known as the Flathead Indian Reservation; that

said Indian reservation is now situate in the counties of Missoula, Lake, Flathead and Sanders, in the State of Montana, and its boundaries were at the time of the creation of said reservation fixed and defined as follows, to wit: Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko River, to a point on Clark's Fork between Camas and Horse Prairies; thence northerly to and along the divide bounding on the west of the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Pruna, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning. That ever since said 8th day of April, 1859, the above mentioned and described tract of land, has been, and the same is now, an Indian reservation, subject to the rights of said tribes, and the said reservation since said 8th day of [4] April, 1859, has been, and now is, occupied and inhabited by said tribes of Indians.

III.

That by the establishment of this reservation, the United States became the trustee of the Confederated Tribes of the Flathead, Kootenai and Upper Pend d'Oreilles Indians, holding legal title to all of the lands and waters of the Flathead Indian Reser-

vation, which boundaries are defined in paragraph 2 of this complaint and there was then reserved to said Indians for irrigation and other beneficial uses upon the lands of said Reservation and exempted from appropriation under territorial or State laws or otherwise all of the waters upon said reservation, including all of the waters of Post Creek, which has its source and flows wholly within the boundaries of said Reservation.

IV.

That by virtue of the Act of Congress of April 30, 1908 (35 Stat. L. 70, 83), the sum of Fifty Thousand (\$50,000) Dollars was appropriated from public moneys for preliminary surveys, plans and estimates of Irrigating systems to irrigate the lands allotted by the Act of Congress of April 23, 1904 (33 Stat. 302), and the unallotted and irrigable lands on the Flathead Indian Reservation, and to begin construction of the same; that in succeeding years by acts of Congress further amounts were appropriated for the construction, operation and maintenance of the system thus commenced; that up to June 30, 1935 the United States had expended the sum of \$7,238,189.19 for the construction of the Flathead irrigation project in Montana; and that the United States now owns, operates and is in control of the Flathead irrigation project. That during the 1935 irrigation season there were irrigated 67,513 acres of land through the Flathead irrigation project system on the Flathead Indian Reservation

in Montana; that all of the waters of Post Creek so appropriated and diverted by the United States for use in its Flathead irrigation project are necessary [5] for the successful irrigation of lands lying under said project.

V.

That at the time of the ratification of said treaty of July 16, 1855, and ever since said time continuing to the present, Post Creek was and is an existing, innavigable stream of water rising in the Mission mountains located on the Flathead Indian Reservation in Montana, and flowing in a southwesterly direction through a well defined channel with natural banks, and in its natural course across lands of said reservation empties into Mission Creek at a point located within said reservation.

VI.

That as further notice to all landowners and settlers along Post Creek that the United States was the sole owner of the waters flowing therein and of the right to the use of the same, pursuant to the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), and under and by virtue of an Act of the Legislative Assembly of the State of Montana, entitled: "An Act authorizing the Government of the United States to appropriate the water of the streams of the State of Montana * * *," approved February 27, 1905 (Revised Codes of Montana, 1921, Section 7099), the United States through H. N. Savage, Supervising Engineer, U. S.

Reclamation Service, thereunto duly authorized by the Secretary of the Interior of the United States in that behalf, did make the following appropriations of the waters of Post Creek and its tributaries:—

Date of Appropriation	Amount of Appropriation	Date of Recordation in Office of County Clerk & Recorder, Missoula County, Montana	Vol. & Page Recorded in Book of Water Rights
Mar. 13, 1913	5,000 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J, p. 21
Mar. 31, 1913	500 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J, p. 13
Apr. 5, 1912 Mar. 29, 1913	500 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J, p. 25

[6]

That the United States applied these waters to beneficial use within the time specified by the laws of the State of Montana and for the purposes as set out in the aforesaid Notices of Appropriation; that the United States has continuously used and is now using all of the waters of Post Creek in its Flathead Irrigation Project System.

VII.

That pursuant to the Acts of Congress of June 21, 1906 (34 Stat. 354), and May 29, 1908 (35 Stat. 448), the United States, through its designated agent, the Secretary of the Interior, recognized all early water right developments of Indians and white settlers on the Flathead Indian Reservation

in Montana which had been made prior to the year 1909.

That a committee appointed by the Secretary of the Interior made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909.

That on December 10, 1919, this committee reported to the Secretary of the Interior in regard to early developments of water rights on Post Creek and other streams within the boundaries of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior issued pursuant to law. That the report of said committee and its recommendations were approved by said Secretary on November 25, 1921.

VIII.

That the defendant, B. W. Alexander, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The East half ($E1\frac{1}{2}$) of the Northeast quarter ($NE\frac{1}{4}$), of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19), West, Montana Principal Meridian. [7]

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 16.8 acres of the above described tract, formerly known as the Duncan McDonald allotment No. 561, to the extent of two (2) acre feet of water per acre per annum, or a total of 33.6 acre feet per annum.

IX.

That the defendants, the Beckwith Mercantile Company, a Montana corporation, and John A. Hazel, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The Southwest quarter (SW $\frac{1}{4}$) of the Northeast quarter (NE $\frac{1}{4}$) and the Northwest quarter (NW $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 8.2 acres of the above described tract, formerly known as the Florence McDonald allotment No. 560, to the extent of two (2) acre feet of water per acre per annum, or a total of 16.4 acre feet per annum.

X.

That the defendants, Theodore Knutson and Edna I. Knutson, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The Southeast quarter ($SE\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$) and the Northeast quarter ($NE\frac{1}{4}$) of the Southwest quarter ($SW\frac{1}{4}$), Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 3.2 acres of the above described tract, formerly known as the Mary C. McDonald allotment No. 559, to the extent of two (2) acre feet of water per acre per annum, or a total of 6.4 acre feet per annum. [8]

XI.

That the defendant, P. W. Sorensen, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The West half ($W\frac{1}{2}$) of the Southwest quarter ($SW\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25,

1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 18.3 acres of the above described tract, formerly known as the Frank Fiddler allotment No. 785, to the extent of two (2) acre feet of water per acre per annum, or a total of 36.6 acre feet per annum.

XII.

That the defendant, Avery A. Stevens, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The Southwest quarter ($SW\frac{1}{4}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian, and the Southeast quarter ($SE\frac{1}{4}$) of the Northeast quarter ($NE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 11.1 acres of the above described tract, formerly known as the William Deschamps allotment No. 781, to the extent of two (2) acre feet of water per acre per annum, or a total of 22.2 acre feet per annum.

XIII.

That the defendants, Avery A. Stevens and Meil C. Pierce, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The East half ($E\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section 17, Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted [9] a valid and subsisting water right from Post Creek to 10.3 acres of the above described tract, formerly known as the Edward Deschamps allotment No. 783, to the extent of two (2) acre feet of water per acre per annum, or a total of 20.6 acre feet per annum.

XIV.

That the defendants, Bert Lish, Bert Myers Nelson and John Ellis, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The West half ($W\frac{1}{2}$) of the Southeast quarter ($SE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid

and subsisting water right from Post Creek to 14.1 acres of the above described tract, formerly known as the Ora Deschamps allotment No. 784, to the extent of two (2) acre feet of water per acre per annum, or a total of 28.2 acre feet per annum.

That the defendant, J. A. McKeever, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The North half ($N\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Twenty-one (21), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 1.4 acres of the above described tract, formerly known as the Caroline McKeever allotment No. 791, to the extent of two (2) acre feet per acre per annum, or a total of 2.8 acre feet per annum.

XVI.

That during the months of June, July, August and September of the irrigation season in the year 1935, the said defendants, B. W. Alexander, the Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert Myers

Nelson and J. A. [10] McKeever, wrongfully and unlawfully diverted from Post Creek through a private ditch known as the McDonald-Deschamps Ditch, 1051.91 acre feet of water; that the amounts they were lawfully entitled to divert under the Secretary of the Interior's decrees of November 25, 1921, were 166.8 acre feet of water during the entire year of 1935; that said defendants threaten to continue to unlawfully divert said excessive amounts of waters of Post Creek contrary to the decrees of the Secretary of the Interior and unless enjoined and restrained will continue so to do.

XVII.

That the defendant, Axel Erickson, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The North half ($N\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts on Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 77.4 acres of the above described tract, known as the Julia Minesinger allotment No. 691, to the extent of two (2) acre feet of water per acre per annum, or a total of 154.8 acre feet per annum.

XVIII.

That the defendants, John Minesinger and Ada B. Minesinger, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The South half ($S\frac{1}{2}$) of the Northwest quarter ($NW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 75.4 acres of the above described tract, formerly known as the John Minesinger allotment No. 690, to the extent of two (2) acre feet of water per acre per annum, or a total of 150.8 acre feet per annum.

XIX.

That the defendant, Thomas Wald, is in possession and control of the following described lands lying within the Flathead Indian Reservation in Montana: [11]

The West half ($W\frac{1}{2}$) of the Southwest quarter ($SW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek

to 52.3 acres of the above described tract, formerly known as the James Waymack allotment No. 689, to the extent of two (2) acre feet of water per acre per annum, or a total of 104.6 acre feet per annum.

XX.

That the defendant, Thomas Wald, is also in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana:

The East half ($E\frac{1}{2}$) of the Southwest quarter ($SE\frac{1}{4}$) of Section Eighteen (18), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908, on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 80 acres of the above described tract, formerly known as the Emma M. Magee allotment No. 688, to the extent of two (2) acre feet of water per acre per annum, or a total of 160 acre feet per annum.

XXI.

That during the months of June, July, August and September of the irrigation season in the year 1935, the said defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and [12] Thomas Wald, wrongfully and unlawfully diverted from Post Creek through a private ditch known as the Magee-Minesinger Ditch, 2180.9 acre feet of water; that the amounts they were lawfully

entitled to divert under the Secretary of the Interior's decree of November 25, 1921, were 570.2 acre feet of water during the entire year of 1935; that said defendants threaten to continue to unlawfully divert said excessive amounts of water of Post Creek contrary to the decree of the Secretary of the Interior and unless enjoined and restrained will continue so to do.

XXII.

That pursuant to the Act of Congress of May 29, 1908 (35 Stat. 448), on November 25, 1921, the Secretary of the Interior promulgated certain rules and regulations in respect to all persons, on the Flathead Indian Reservation in Montana, using water under a decree of the Secretary of the Interior, whereby all affected persons, including said defendants were directed to install suitable headgates at the point where their private ditch taps the stream and at some suitable place on said ditch, as near the head thereof as practicable, place and maintain a proper measuring box, weir or other appliance for the measurement of water flowing in said ditch.

XXIII.

That on several occasions during the irrigation season of 1935, [13] Henry Gerharz, as Project Engineer of the Flathead Irrigation Project and Water Commissioner for the Flathead Indian Reservation, the designated agent of the Secretary of the Interior, notified all of the defendants herein of the above regulations of the Secretary of the In-

terior and demanded of said defendants that they comply with the same. That said defendants, each and all of them have wholly failed, have refused and continue to refuse to comply with said rules and regulations promulgated as aforesaid.

XXIV.

That on several occasions during the irrigation season of 1935, Henry Gerharz, as Project Engineer of the Flathead Irrigation Project and Water Commissioner for the Flathead Indian Reservation, the designated agent of the Secretary of the Interior, notified all of the defendants herein of the amounts of water decreed their lands by the Secretary of the Interior; that they were diverting in excess of the amounts allowed; and demanded of said defendants that they limit their diversions to the amounts so allowed by said Secretary. That said defendants wholly refused to cut down their diversions and continued to divert said waters of Post Creek in excess of the amounts decreed as aforesaid.

XXV.

That the said defendants in diverting and using the waters of Post Creek in excess of the amounts allowed by the Secretary of the Interior, as aforesaid, have been acting entirely without right and wrongfully and unlawfully, and without the consent of this plaintiff or any of its officers or agents, the superintendent of the Flathead Indian Reservation, the Flathead tribe of Indians, the project engineer of the Flathead irrigation project, the Water Com-

missioner for the Flathead Indian Reservation, or anyone who could lawfully give such consent.

XXVI.

That said defendants in so doing the acts complained of have deprived the Flathead irrigation project of large amounts of water for use in its system for distribution to other lands lying under its [14] canals. That said water so diverted in excess of the amounts allowed by the Secretary of the Interior pursuant to law are necessary for the successful cultivation of other lands lying under the Flathead irrigation project system and the growing of crops thereon and have caused said lands to have available therefor an inadequate supply of water.

XXVII.

That by reason of the refusal of said defendants to abide by the regulations of the Secretary of the Interior made pursuant to law in failing to have suitable head gates installed at the points where the McDonald-Deschamp and the Magee-Minesinger ditches tap Post Creek and in failing to install at some suitable place on said ditches and as near the heads thereof as practicable a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch and in failing to measure the water used upon their lands and wrongfully and unlawfully diverting through said ditches excessive amounts of water, great and irreparable injury, loss and damage has been suffered by the plaintiff, and such irreparable injury, loss and dam-

age will continue to be suffered by plaintiff so long as said water is so diverted and taken; that by reason of the plaintiff being unable to deliver sufficient waters to other lands lying under its project system necessary for the successful cultivation of the same, largely aggravated as a result of these unlawful and excessive diversions, many tracts of land, which would be paying plaintiff operation and maintenance charges, are not being farmed because of the shortage of water as aforesaid.

That great and irreparable loss and damage is being caused plaintiff and its irrigation project system by the excessive diversions of the defendants and each of them, and by their interference with said irrigation project system by the excessive diversions of the defendants and each of them, and by their interference with said irrigation project so built and constructed as aforesaid, and by the taking therefrom of waters lawfully belonging to this plaintiff for [15] use in its irrigation project system, and to which it is entitled to have flow to and through the said Flathead irrigation project.

XXVIII.

That said plaintiff has no plain, speedy, adequate or complete remedy at law; or otherwise, nor any remedy whatsoever except in a Court of Equity where such matters are cognizable.

Wherefore said plaintiff prays that a permanent injunction issue enjoining and restraining the said defendants, their agents, servants, or employees,

and all persons claiming under, through or by them, from diverting any waters of Post Creek, and its tributaries, in excess of the amounts decreed by the Secretary of the Interior, as aforesaid, and from diverting any waters of Post Creek, and its tributaries to said lands described herein, owned by them or in their control, until said defendants have installed suitable head gates at the points where the McDonald-Deschamp and the Magee-Minesinger ditches tap Post Creek, and until they have placed a proper measuring box, weir, or other appliance for the measurement of the waters flowing in said ditches, at some suitable place on said ditches; that plaintiff have and recover its costs and disbursements herein expended, and that said plaintiff have such other and further relief as shall appear to the Court meet and proper.

JOHN B. TANSIL,

United States Attorney for
the District of Montana.

KENNETH R. L. SIMMONS,

District Counsel, Department
of the Interior, United
States Indian Irrigation
Service.

[Verification]

[Endorsed]: Filed April 23, 1936. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.]

[16]

Thereafter, on May 19, 1936, Demurrer to Complaint was filed herein, in the words and figures following, to wit: [17]

[Title of District Court and Cause.]

DEMURRER

(of all defendants)

Now come the defendants above named and demur to the complaint of plaintiff filed herein, and as grounds therefor allege:

I.

That the complaint does not state facts sufficient to constitute a cause of action against these defendants or each or any of them.

II.

That the complaint is ambiguous:

1. That it cannot be ascertained from said complaint what interest plaintiff has in or right to defendants' lands described, or what interest in, or right to any appurtenance thereto belonging.

2. The amount of water admittedly defendants own or have the right to the use of cannot be ascertained from said complaint. While the complaint alleges "acre feet", there is no such measurement authorized or recognized in the State of Montana.

3. That it cannot be ascertained from said complaint whether plaintiff, as sole owner of the lands and water on the Flathead Indian Reservation claims the right to interfere with defendants' use of the water, or whether, as an appropriator of

water under the laws of the State of Montana, there is a conflict in the use of said water, and that this is an action for the protection of rights acquired to the waters of Post Creek. [18]

III.

That the complaint is unintelligible and uncertain in this:

1. In Paragraph 2 of said complaint it is claimed that the United States set aside and reserved for the exclusive use, benefit and occupancy of the Confederate Tribes a general Indian Reservation, and whereas said Treaty referred to expressly reserved from the lands ceded to the United States for the use and occupation of the said Confederate Tribes and as a general Indian Reservation certain described lands, and such reserved lands were never ceded to the United States, according to the said Treaty, and the United States never, at any time, became the owner of any of said lands, or any of the water thereon.

IV.

1. There is a defect of parties defendant in that this is an action to adjudicate the waters of Post Creek and it is alleged that the distribution and use of said water is under the jurisdiction of the Secretary of the Interior, and therefore the Secretary of the Interior is a necessary party to this action.

2. The complaint sets forth that this water is under the supervision and control of one Henry

Gerharz as Project Manager of the Flathead Irrigation Project and as Water Commissioner for the Flathead Irrigation District and therefore said Henry Gerharz, as such alleged Project Manager, and such alleged Water Commissioner, is a necessary party so that his acts may be controlled by this Court in a final decree.

3. Said complaint alleges other rights to the use of the waters of Post Creek, and many other ditches, the owners of [19] which are necessary defendants in order that the whole controversy may be settled in one action if this is an action to have adjudicated the various rights on Post Creek.

4. There is a misjoinder of parties defendant in that two ditch owners are set out and described in the complaint and the owners of which ditches have no connection one with the other, and therefore all of the parties using water on Post Creek should be brought in on one complaint, or this action should be dismissed as to one or the other of the owners of the two ditches mentioned.

Dated this 19th day of May, 1936.

ELMER E. HERSHEY

Missoula, Montana

Attorney for defendants.

[Endorsed]: Filed May 19, 1936. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[20]

That on September 14, 1936, Order overruling Demurrer was duly entered herein, in the words and figures following, to wit: [21]

[Title of District Court and Cause.]

ORDER OVERRULING DEMURRER TO
BILL OF COMPLAINT.

The bill of complaint in this case is far from a model of good pleading, however, it is, in my opinion, sufficient to withstand the attack made upon it. (Treaty of July 16, 1855, 12 Stat. L. 975; 2 Kappler Indian Laws and Treaties, 722, 723 and 724; Fletcher v. Peck, 6 Cranch 142, 10 U. S. 79; Johnson & Graham's Lessee v. McIntosh, 8 Wheat. 572, 21 U. S. 252; American Insurance Company v. 356 Bales of Cotton, 1 Pet. 541, 26 U. S. 411; Beecher v. Wetherby, 95 U. S. 517; Minnesota v. Hitchcock, 185 U. S. 373, 389; U. S. v. Richert, 188 U. S. 432; U. S. v. Joseph, 94 U. S. 618; U. S. v. Celestine, 215 U. S. 278; Hallowell v. U. S., 221 U. S. 317; Ex Parte Van Moore, 221 Fed. 968; U. S. v. Wightman, 230 Fed. 218; Lone Wolf v. Hitchcock, 187 U. S. 553; Spaulding v. Chandler, 160 U. S. 395; Secs. 1 & 17 of the Organic Act of the Territory of Montana, approved May 26, 1864, 13 Stat. 85; Sec. 4 of the Enabling Act, approved February 22, 1889, 25 Stat. 676; Ordinance No. 1, Second, Constitution of the State of Montana; Winters v. U. S., 207 U. S. 563, 148 Fed. 684 and 143 Fed. 749; Conrad Investment Company v. U. S., 161 Fed. 829 and 156 Fed. 124; North Side Canal Company v. Twin Falls Canal Company, 12 Fed. 2d 311, 314)

It follows that the demurrer, both general and special, to the bill of complaint on file herein should be and it is hereby overruled. The defendants are, and each of them is, granted an exception to this ruling and ten (10) days after written notice thereof in which to plead further if so advised.

Done September 14, 1936.

JAMES H. BALDWIN
United States District Judge,
District of Montana.

[Endorsed]: Filed Sept. 14, 1936. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.
[22]

Thereafter, on September 23, 1936, an Answer was duly filed herein, in the words and figures following, to wit: [23]

[Title of District Court and Cause.]

ANSWER

Now comes B. W. Alexander, Beckwith Mercantile Company, a corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald and for their answer to the bill of complaint filed herein admit, deny and allege as follows:

I.

Admit that the defendants herein named are citizens of the United States and the State of Montana, and that they reside in Lake County, Montana. Admit that the Beckwith Mercantile Company is a corporation created, organized and existing under and by virtue of the laws of the State of Montana. Deny all other allegations of Paragraph 1 not heretofore admitted.

II.

Admit that a treaty between the United States of America and the confederated tribes of Flathead, Kootenai and Upper Pend D'Orielle Indians was made and ratified and proclaimed as set forth in Paragraph II of said complaint.

Admit that said confederated tribes ceded, relinquished and conveyed to the United States a large part of the country then owned or claimed by them.

Deny that the United States set aside and then reserved for the exclusive use, benefit and occupancy of said confederated tribes as a general Indian reservation any part of the land so ceded, relinquished or conveyed. Deny that the [24] Indian reservation designated and known as the Flathead Indian Reservation is a part of the lands ceded, relinquished or conveyed to the United States by said treaty. Deny that the lands described in said Paragraph 2 is now an Indian reservation subject to the rights of said tribe or otherwise. Deny that the lands so described in said paragraph 2 since said 8th day of April, 1859 have been, or now are, oc-

cupied or inhabited by said tribe of Indians as alleged in said paragraph.

These defendants deny all of the allegations of Paragraph 2 not herein admitted.

III.

Deny that by the establishment of this reservation the United States, as sole owner of the lands and waters thereon, or as part owner or any owner whatever, made any reservation for irrigation or other beneficial use upon the lands of said reservation, and deny that the United States exempted from appropriation under territorial or state law or otherwise all or any of the waters upon said reservation, either the waters of Post Creek or at all.

Deny each and every allegation of Paragraph 3 not herein admitted.

IV.

These defendants deny that they have any information sufficient to form a belief as to the allegations of Paragraph 4 of said bill of complaint and for this reason deny each and every allegation of Paragraph 4.

V.

Admit that Post Creek at all times was and is an existing, unnavigable and innavigable stream of water rising in the [25] Mission Mountains in Montana and that it flows in a southwesterly direction through a well defined channel with natural banks.

Deny all other allegations of Paragraph 5.

VI.

Deny the allegations of Paragraph 6 and the whole thereof.

VII.

Deny the allegations of Paragraph 7 and the whole thereof.

VIII.

Admit that the defendant B. W. Alexander is in control and possession of the lands described in said complaint, and admit that said lands were allotted to Duncan McDonald, No. 561.

Deny all other allegations of said paragraph 8.

IX.

Admit that the defendants, the Beckwith Mercantile Company, a Montana corporation, and John A. Hazel are in control and possession of the lands described in Paragraph 9 and admit that said lands were allotted to Florence McDonald No. 560.

Deny all other allegations of said Paragraph 9.

X.

Admit that the defendants Theodore Knutson and Edna I. Knutson, his wife, are in control and possession of the lands described in Paragraph 10, and admit that said lands were allotted to Mary C. McDonald, No. 559.

Deny all other allegations of said Paragraph 10.

XI.

Admit that the defendant P. W. Sorensen is in control and possession of the lands described in Paragraph 11, and admit that said lands were allotted to Frank Fiddler, No. 785.

Deny all other allegations of said Paragraph 11.
[26]

XII.

Admit that the defendant Avery A. Stevens is in control and possession of the lands described in Paragraph 12, and admit that said lands were allotted to William Deschamps, No. 781.

Deny all other allegations of said Paragraph 12.

XIII.

Admit that the defendants Avery A. Stevens and Neil C. Pierce are in control and possession of the land described in Paragraph 13, and admit that said lands were allotted to Edward Deschamps, No. 783.

Deny all other allegations of said Paragraph 13.

XIV.

Admit that the defendant Bert Lish is in control and possession of the Southwest Quarter of the Southeast Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian, and admit that said lands were allotted to Ora Deschamps, No. 784.

Deny all other allegations of said Paragraph 14.

XV.

Deny the allegations of Paragraph 16 and the whole thereof.

XVI.

Admit that the defendants John Minesinger and Ada B. Minesinger are in control and possession of the lands described in Paragraph 18, and admit that said lands were allotted to John Minesinger, No. 690.

Deny all other allegations of said Paragraph 18.

XVII.

Admit that the defendant Thomas Wald is in control and possession of the lands described in Paragraph 19, and admit that [27] said lands were allotted to James Waymack, No. 689.

Deny all other allegations of said Paragraph 19.

XVIII.

Admit that the defendant Thomas Wald is in control and possession of the lands described in Paragraph 20, and admit that said lands were allotted to Emma M. Magee, No. 688.

Deny all other allegations of said Paragraph 20.

XIX.

Deny the allegations of Paragraph 21 and the whole thereof.

XX.

Deny the allegations of Paragraph 22 and the whole thereof.

XXI.

Deny each and all the allegations contained in said bill of complaint, not herein specifically admitted, qualified or denied.

These Defendants, Further Answering the Bill of Complaint of Plaintiff Herein, and as a New Matter Entitling Them to Affirmative Relief, Allege as Follows:

1. That on the 16th day of July, 1855 a treaty was made and concluded on the part of the United States of America and the confederated tribes of Flathead, Kootenai and Upper Pend D'Oriellis Indians whereby said Indians ceded, relinquished and conveyed to the United States all their right, title and interest in and to the country owned or claimed by them, particularly bounded and described in Article 1 of said treaty. Article 2 of said treaty reserved from the lands ceded for the use and occupation of said confederated tribes, as a general Indian reservation, certain lands to be known as the Flathead Indian Reservation.

Said tract was to be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian Reservation. No white man was to be permitted to reside upon said reservation without the [28] permission of said confederated tribes.

2. On April 23, 1904 (33 Stat. L. p. 302) Congress of the United States passed an Act for the survey and allotment of the lands embraced within said Indian reservation and the sale of all surplus lands after allotment, and in said Act made express provision that the United States, the plaintiff herein, should not be bound to purchase any portion of the lands of said Indian reservation.

3. That said lands on said reservation, and particularly the lands described in plaintiff's complaint and this answer, are arid lands and require artificial irrigation in order to produce crops to the full extent of the soil thereof, and that generally one inch per acre is at all times necessary and required for the irrigation of said lands; that beneficial use is the measure of the right in the irrigation of said land.

That on or about the first day of May, 1905 what is known as the McDonald-Deschamps Ditch was dug and constructed from Post Creek to the lands hereinafter described with a carrying capacity of 500 inches, or $12\frac{1}{2}$ cubic feet of water per second of time, and the Indian allottees who dug said ditch appropriated through said ditch sufficient water to irrigate their land as hereinafter set forth; and on or about the first day of May, 1906, the ditch known as the Magee-Minesinger ditch was dug and constructed from Post Creek to the lands hereinafter described, said ditch having a carrying capacity of 600 inches or 15 cubic feet of water per second of time, and the Indian allottees who dug said ditch appropriated, through said ditch, sufficient water to irrigate their lands as hereinafter set forth. [29]

That trust patents issued to each of said Indian allottees on or about October 8, 1908, and thereafter fee patents were issued to each of said Indian allottees, and said Indian allottees thereby became the sole owner in fee of said lands, with all the rights,

privileges, immunities and appurtenances of whatsoever nature thereunto belonging, including the water appurtenant thereto appropriated through said McDonald-Deschamps Ditch and said Magee-Minesinger Ditch and lateral ditches dug and constructed, carrying water to the lands so owned by each; that the defendants herein became the purchasers of said lands, with all the rights, privileges, immunities and appurtenances of whatsoever nature, and now are the owners of said lands and water right from Post Creek.

4. That the following parties, defendants herein, are the owners of the lands in their control and possession, and water from the McDonald-Deschamps Ditch, to-wit:

(a) B. W. Alexander is the owner of the lands patented to Duncan McDonald under allotment No. 561, described as follows:

The East Half of the Northeast Quarter of Section 16, Township 19 North, Range 19 West Montana Meridian.

That said defendant is using 50 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(b) The Beckwith Merchantile Company, a Montana corporation, and John A. Hazel, are the owners of the lands patented to Florence McDonald under allotment No. 560, described as follows:

The Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter of Section 16, Township 19, North Range 19 West, Montana Meridian.

That said defendants are using 50 inches of water on said 80 acres, and the same is necessary and required to properly [30] irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid:

(c) That Theodore Knutson and Edna I. Knutson, his wife, are the owners of the lands patented to Mary G. McDonald under allotment No. 559, described as follows:

The Southeast Quarter of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter, Section 16, Township 19, North, Range 19 West Montana Meridian.

That said defendants are using 40 inches of water on said 80 acres and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(d) That P. W. Sorensen is the owner of the lands patented to Frank Fiddler under allotment No. 785, described as follows:

The West Half of the Southwest Quarter of Section 16, Township 19 North, Range 19 West, Montana Meridian.

That said defendant is using 50 inches of water on said 80 acres, and the same is necessary and re-

quired to properly irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(e) That Avery A. Stevens is the owner of the lands patented to William Deschamps under allotment No. 781, described as follows:

The Southwest Quarter of the Northwest Quarter of Section 16, Township 19 North, Range 19 West Montana Meridian, and the Southeast Quarter of the Northeast Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian.

That said defendant is using 40 inches of water on said 80 acres, and the same is necessary and required to properly [31] irrigate said 80 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

Also, that Avery A. Stevens is the owner of the lands patented to Edward Deschamps under allotment No. 785, described as follows:

The North thirty acres of the Northeast Quarter of the Southeast Quarter, Section 17, Township 19, North, Range 19 West, Montana Meridian.

That said defendant is using 30 inches of water on said 30 acres, and the same is necessary and required to properly irrigate said 30 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(f) That Meil C. Pierce is the owner of the lands patented to Edward Deschamps under Allotment No. 785, described as follows:

The South 10 acres of the Northeast Quarter of the Southeast Quarter and the Southeast Quarter of the Southeast Quarter, Section 17, Township 19, North, Range 19 West Montana Meridian.

That said defendant is using 50 inches of water on said 50 acres, and the same is necessary and required to properly irrigate said 50 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid.

(g) That Bert Lish is the owner of the lands patented to Ora Deschamps under allotment No. 784, described as follows:

The Southwest Quarter of the Southeast Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian.

That said defendant is using 40 inches of water on said 40 acres, and the same is necessary and required to properly irrigate said 40 acres of land. Said appropriation was made through the McDonald-Deschamps Ditch as aforesaid. [32]

5. That said water so appropriated by each of the foregoing parties can be used upon all of the lands herein described.

6. That the following parties, defendants herein, are the owners of the lands in their control and pos-

session and the water from the Magee-Minesinger Ditch, to-wit:

(a) That John Minesinger and Ada B. Minesinger, his wife, are the owners of the lands patented to John Minesinger under allotment No. 690, described as follows:

The South Half of the Northwest Quarter of Section 17, Township 19 North, Range 19 West Montana Meridian.

That said defendants are using 80 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the Magee-Minesinger Ditch as aforesaid.

(b) That Thomas Wald is the owner of the lands patented to James Waymack under allotment No. 689, described as follows:

The West Half of the Southwest Quarter of Section 17, Township 19 North, Range 19 West, Montana Meridian.

That said defendant is using 80 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the Magee Minesinger Ditch as aforesaid.

Also, that Thomas Wald is the owner of the lands patented to Emma Magee under allotment No. 688, described as follows:

The East Half of the Southeast Quarter of Section 18, Township 19 North, Range 19 West, Montana Meridian. [33]

That said defendant is using 80 inches of water on said 80 acres, and the same is necessary and required to properly irrigate said 80 acres of land. Said appropriation was made through the Magee-Minesinger Ditch as aforesaid.

7. That these defendants are ready and willing at all times to place proper measuring devices in their several ditches so that the water received by each of them may be properly measured.

8. That the waters appropriated for the irrigation of the foregoing lands are sufficient to irrigate said lands, and is all the water that these defendants have been using for the irrigation of their lands, but that plaintiff has, from time to time, been charging these defendants with water from the Reclamation Service never used, and through ditches never dug, under the pretense that said lands require additional water from the Reclamation Service.

Wherefore, the following defendants pray that they be decreed to be the owners and entitled to use the water appropriated through the McDonald-Deschamps Ditch as follows:

To defendant B. W. Alexander	50 Inches
To defendants Theodore Knutson and Edna Knutson, his wife	40 Inches
To defendant P. W. Sorensen	50 Inches
To defendant Avery A. Stevens	70 Inches
To defendant Meil C. Pierce	50 Inches
To defendant Bert Lish	40 Inches
To defendants Beckwith Mercantile Company and John A. Hazel	50 Inches

And the following defendants pray that they be decreed to be the owners and entitled to use the water appropriated through the Magee-Minesinger Ditch as follows:

To defendants John Minesinger and

Ada I. Minesinger, his wife 80 Inches

To defendant Thomas Wald 160 Inches [34]

And that plaintiff be restrained from interfering with their said several rights, and from charging these defendants for the use of water never delivered and through ditches never dug, and that defendants have such other and further relief as shall appear to the Court proper, including the costs of these defendants herein expended.

ELMER E. HERSHEY

Attorney for these answering
defendants.

[Verification]

[Endorsed]: Filed September 23, 1936. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [35]

Thereafter, on September 29th, 1936, Plaintiff's Reply to Answer was duly filed herein, in the words and figures following, to wit: [36]

[Title of District Court and Cause.]

REPLY

Comes now the plaintiff, and for reply to the further answer, and new matter set out therein of the defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, admits, denies and alleges as follows, to-wit:

I.

Admits the allegations contained in Paragraph 1 of said further answer.

II.

Admits the enactment into law of the Act of Congress of April 23, 1904 (33 Stat. L. 302).

III.

Admits that said lands on the reservation and the lands described in plaintiff's bill of complaint are arid lands and require artificial irrigation in order to produce crops to the full extent of the soil thereof. Denies that generally one inch per acre is at all times necessary and required for the irrigation of said lands and that beneficial use is the measure of the right in the irrigation of said land.

Replying to the second paragraph of paragraph 3 of defendants' further answer, plaintiff denies that

the McDonald-Deschamps ditch was dug and constructed in May, 1905 with a carrying capacity of 500 inches or $12\frac{1}{2}$ cubic feet of water per second of time and denies that the Indian allottees who dug said ditch appropriated through said ditch sufficient water to irrigate [37] their lands in the amounts set forth in their further answer.

Plaintiff denies that the Magee-Minesinger ditch was dug and constructed in May 1905, with a carrying capacity of 600 inches or 15 cubic feet of water per second of time, and denies that the Indian allottees who dug said ditch appropriated through said ditch sufficient water to irrigate their lands in the amounts set forth in their further answer.

And in this connection, plaintiff alleges that in 1906 Joseph McDonald, William, Edward and Joseph Deschamps constructed a ditch diverting water from Post Creek at a point on the left bank in the Southeast quarter of the Northwest quarter of the Northeast quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$ $NE\frac{1}{4}$) of Section Ten (10), Township Nineteen (19) North, Range Nineteen (19), West, M. P. M. for the purpose of conveying water upon portions of the following allotments: Edward Deschamps, No. 783; Ora Deschamps, No. 784; William Deschamps, No. 781; Frank Fiddler, No. 785; Duncan McDonald, No. 561; Florence McDonald, No. 560; Mary C. McDonald, No. 559; that Caroline McKeever, in 1908, extended said ditch, described above, for the purpose of conveying water upon portions of the Caroline McKeever allotment No. 791. Plaintiff further

alleges that George Buckhouse, in 1907 and 1908, constructed a ditch diverting water from Post Creek at a point on the left bank in the Southeast quarter of the Northwest quarter of the Northeast quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$) of Section Ten (10), Township Nineteen (19) North, Range Nineteen (19) West M. P. M. for the purpose of conveying water upon portions of the John Minesinger allotment, No. 690, and the Julia Minesinger allotment, No. 691; that in 1908 A. D. Magee extended this ditch constructed by the said George Buckhouse for the purpose of conveying water upon portions of the Emma M. Magee allotment, No. [38] 688, and the James Waymack allotment, No. 689.

Admits that trust patents issued to each of said Indian allottees and thereafter fee patents were issued.

Denies each and every other allegation contained in paragraph 3 of said further answer, not herein specifically qualified or admitted.

IV.

Admits the defendants are the owners of the lands described in paragraph 4 of said further answer and that said defendants are diverting waters to said lands. Plaintiff denies the amounts of water being diverted for the reason that it is impossible to ascertain from the allegations therein contained whether said diversions are made continuously throughout the year or are limited to the irrigation season. Denies the duty of water as set out for the lands of said defendants.

V.

Denies each and every allegation contained in paragraph 5 of said further answer.

VI.

Admits the defendants are the owners of the lands described in paragraph 6 of said further answer and that said defendants are diverting waters to said lands. Plaintiff denies the amounts of water being diverted for the reason that it is impossible to ascertain from the allegations therein contained whether said diversions are made continuously throughout the year or are limited to the irrigation season. Denies the duty of water as set out for the lands of said defendants.

VII.

Denies each and every allegation contained in paragraphs 7 and 8 of said further answer. [39]

VIII.

Plaintiff denies, generally, each and every matter, thing and allegation contained in said further answer and in the new matter set out therein, not herein admitted, qualified or denied.

IX.

Plaintiff, replying to said answer as a whole and to each and every allegation of new matter or affirmative matter therein contained, denies, generally, each and every allegation of new or affirmative

matter therein contained not herein specifically admitted, qualified or denied.

Wherefore, the plaintiff having fully replied to the said answer and allegations therein contained, renews its prayer for the relief sought in plaintiff's bill of complaint or file herein.

JOHN B. TANSIL

United States Attorney for the
District of Montana.

KENNETH R. L. SIMMONS

District Counsel, U. S. I. I. S.,
Department of the Interior.

[Verification]

[Endorsed]: Filed September 29, 1936. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [40]

Thereafter, on June 30, 1939, Motion to Intervene by Flathead Irrigation District, et al., was duly filed herein, in the words and figures following, to wit: [41]

[Title of District Court and Cause.]

MOTION TO INTERVENE

Comes now the Flathead Irrigation District, a Municipal Corporation of the State of Montana, and Dennis A. Dellwo, and move the court for leave to intervene in the above entitled action and to file the complaint in intervention and answer to bill of

complaint served herewith on the grounds and for the reasons as follows, to-wit:

I.

That the representation of the interveners' interests by the United States will be inadequate and the interveners will or may be bound by the judgment for the reasons: The Flathead Irrigation District will, under its repayment contract with the United States, succeed to the rights of the United States in and to the water distribution system of the Flathead Irrigation Project. The value of the said system is dependent solely upon the waters available for distribution through it. The intervener, Dellwo, is a user of water under the Flathead Irrigation Project and the amount of water which he receives is based upon the amount generally available for the Flathead Irrigation Project system. That the United States, as owner of said system, is conceding that certain purported awards made by the Secretary of the Interior to the defendants in this case are valid whereas said awards were made without the power of the Secretary of the Interior and are void. The United States will not assert the invalidity of said awards. That the recognition of said rights by the United States will deprive the Flathead Irrigation Project system of water to which it is lawfully entitled and will therefore deprive the users under the system of water to which they are entitled. [42]

II.

That the claims of the interveners involve common questions of both law and fact in that the Flathead Irrigation Project will ultimately succeed to all of the rights of the United States and that the intervener, Dellwo, as a water user, will get only a proportionate share of the water available for delivery by the United States. That, as the amount of water available for the United States is increased or diminished the water of the intervener, Dellwo, is increased or diminished, and that all of the questions of both law and fact involved are common to the rights of the United States, the Flathead Irrigation Project and the intervener, Dellwo.

Reference is hereby made to the complaint in intervention and answer to bill of complaint served herewith.

Dated this 8th day of May, 1939.

RUSSELL E. SMITH

Attorney for Interveners,
Flathead Irrigation District
and Dennis A. Dellwo.

[Endorsed]: Filed June 30, 1939. C. R. Garlow,
Clerk, U. S. Court, District of Montana. [43]

Thereafter, on July 18, 1939, Objections of Defendants to Complaint in Intervention & Motion to Intervene were duly filed herein, in the words and figures following, to wit: [44]

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANTS TO COMPLAINT IN INTERVENTION AND MOTION TO INTERVENE.

Come now the Defendants in the above entitled action and separately object to the motion of Flathead Irrigation District and Dennis A. Dellwo for leave of court to intervene in the above entitled action and object to the proposed complaint in intervention tendered by said Intervenors separately upon each and all of the grounds and reasons stated, as follows:

1. That said proposed complaint in intervention does not state facts sufficient to constitute a cause of action against the Plaintiff or against any of the Defendants in the above entitled action.

2. That said proposed complaint in intervention and said motion for leave to intervene do not state facts sufficient to show that said Intervenors have any right or interest which will or may be inadequately represented by the United States or that said Intervenors will or may be bound by the judgment entered in the above entitled action.

3. That said proposed complaint in intervention and said motion for leave to intervene do not state facts sufficient to show that a question of law or fact raised therein or in either of them is in common with any question of law or fact in the above entitled action.

4. That it affirmatively appears that from said proposed complaint in intervention and said motion

for leave to intervene if the said Intervenor have any interest in the controversy involved in the above entitled action, such interest is derived from and in privity with that of the Plaintiff, United States of America, is not greater than the interest of the Plaintiff and is subject to all of the rights and interests of each and all of the Defendants in and to the property and rights in controversy in the above entitled action. [45]

5. That said proposed complaint in intervention and said motion for leave to intervene do not state facts sufficient to show that the rights and interests of the Defendants in and to the waters of Post Creek, which are in controversy in the above entitled action, are within the Flathead Irrigation District or are within the watershed from which said Flathead Irrigation District properly and legally obtains or expects to obtain its water for irrigation of the lands of the members of said District, or properly and legally affects the rights of the Intervenor, or that the Intervenor, or either of them, have any right, title or interest by virtue of their repayment contract relied upon by them, or otherwise, to question or cause to be questioned the rights of the individual Defendants in the above entitled action, as between said Defendants and the Plaintiff, United States of America.

MURPHY & WHITLOCK,

Attorneys for Defendants.

[Endorsed]: Filed July 18, 1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

Thereafter, on July 20, 1939, Order Allowing Intervention was duly entered herein, in the words and figures following, to wit: [47]

[Title of District Court and Cause.]

ORDER ALLOWING INTERVENTION.

The Motion of Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, to intervene in the above entitled Cause came on regularly to be heard in open Court this 18th day of July, 1939, at 10 o'clock A.M., pursuant to an order of the Court served upon all parties to the action more than five days prior to said 18th day of July, 1939, the Plaintiff, United States of America, appeared by R. Lewis Brown, Assistant United States Attorney, the Defendants heretofore appearing to the complaint of the United States appeared by objections filed by Messrs. Murphy and Whitlock, who did not appear in person, and the movants, Flathead Irrigation District, a Corporation, and Dennis A. Dellwo appeared by Counsel Russell E. Smith; the Defendants, Bert Myers Nelson, John Ellis, J. A. McKeever and Axel Erickson did not appear,

Whereupon, the matter was argued by appearing Counsel and the Court being now fully advised in the premises,

It Is Ordered, that the Motion of the Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, to intervene in the above entitled Cause be, and the same is, hereby granted, and the Clerk of

this Court is hereby ordered to file forthwith the complaint in Intervention heretofore lodged with him, copies of which were heretofore served upon all of the parties to this action, at the time of service of the Motion to Intervene.

It Is Further Ordered that the Plaintiff and the Defendants have twenty days after service of this Order within which to answer the complaint in Intervention filed here,

Done this 20th day of July, 1939.

JAMES H. BALDWIN,
Judge.

[Endorsed]: Filed and entered July 20, 1939.
C. R. Garlow, Clerk, U. S. District Court, District of Montana. [48]

Thereafter, on July 20th, 1939, Complaint in Intervention & Answer to Bill of Complaint was filed by the Intervenors herein, in the words and figures following, to wit: [49]

[Title of District Court and Cause.]

COMPLAINT IN INTERVENTION AND ANSWER TO BILL OF COMPLAINT.

Come now the interveners, pursuant to the order of court herein allowing intervention, and for cause of action allege:

I.

That Dennis A. Dellwo is the owner of the East Half of the Southwest Quarter (E $\frac{1}{2}$ SW $\frac{1}{4}$), of

Section Twenty-six (26), Township Twenty (20) North, Range Twenty-one (21) West, Lake County, Montana. That said land is situated within the boundaries of the Flathead Indian Reservation and is included within the Flathead Irrigation District. That the said Dennis A. Dellwo is the successor in interest of Margareta Gariepy, a Flathead Indian, and that the land above described was allotted by the United States and said Margareta Gariepy as an Indian ward of the United States, and was, subsequent to the issuance of a fee patent by the United States to said Margareta Gariepy, sold to said Dennis A. Dellwo.

II.

That the Beckwith Mercantile Company is a corporation organized and existing under and by virtue of the laws of the State of Montana.

III.

That by virtue of a treaty between the United States of America and the Confederated Tribes of Flathead, Kootenai, and Upper Pend d'Oreilles Indians, made July 16, 1855 (12 Stat. L. 975), ratified March 8, 1859, by the Senate of the United States and regularly proclaimed by the President of the United States April 15, 1859, said Confederated Tribes conveyed to the United States their rights in and to a large portion of the country then occupied and claimed by them, and the United States set aside and reserved for the exclusive use, benefit and occupancy [50] of said Confederated

Tribes, and as a general Indian Reservation, the lands described in said treaty. That at the said time the United States reserved for the benefit of the Indians the waters flowing within the confines of said Indian Reservation, and thereupon became trustee of said waters for said Indians. That in 1904 the United States adopted a policy looking to the ultimate irrigation of the lands on the said reservation through a central irrigation system and thereafter made surveys and plans for the purpose of providing the greatest possible use of the waters of said reservation and for the purpose of securing a just and equal distribution of the waters of said reservation. That in the year 1908, and prior to the issuance of any allotments in severalty to any of the Indians on the Flathead Reservation, and particularly to any of the defendants in this action, or any of the predecessors in interest of the defendants in this action, the United States, for the purpose of providing a system for the irrigation of the lands upon the Flathead Reservation, by Act of Congress (35 Stat. L. 70), appropriated \$50,000.00 of public moneys for preliminary plans, surveys and estimates of irrigating systems, to irrigate the lands allotted by the Act of Congress of April 23, 1904 (33 Stat. L. 302), and the unallotted and irrigable lands on the Flathead Reservation, and to begin construction of the same. That in the year 1908, and prior to the issuance of any allotments in severalty as aforesaid, the United States, by Act of Congress May 28,

1908 (35 Stat. L. 448), appropriated and reserved all the waters of the said Flathead Irrigation District for distribution under irrigation systems to be constructed by the United States and provided that all water rights on the Flathead Indian Reservation should be taken from systems of irrigation to be constructed by the [51] United States, and at the same time provided that the lands irrigable under the systems provided for which had been allotted to the Indians in severalty should be deemed to have a right to water without cost to said Indians for construction of said system (it being the then intention of the United States to use Indian funds for the construction of said system) but likewise provided that all lands allotted to Indians and all surplus unallotted lands should bear their pro rata share of the cost and operation and maintenance of the system under which said lands lay. That thereafter and pursuant to various Acts of Congress, and up until March 1, 1939, the United States expended in the construction of irrigation systems on the Flathead Indian Reservation the sum of \$8,173,801.14, and that the United States now owns and operates and is in control of the Flathead Irrigation Project. That the said Flathead Irrigation Project delivers water each year for the irrigation of more than 80,000 acres of land on said reservation, and that except for the water delivered by said project a large portion of said lands would be arid.

IV.

That by an order and decree of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake, which was duly given, made and entered on the 26th day of August, 1926, the Flathead Irrigation District was duly created and established as an irrigation district under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts for the purpose of cooperating with the United States in the construction of irrigation works and projects, and this district was duly organized and created pursuant to Acts of Congress of May 29, 1908, (35 Stat. L. 448), Act of May 10, 1926 (44 Stat. L. 464-466), January 12, 1927 (44 Stat. L. 945), [52] March 7, 1928 (45 Stat. L. 212-213), March 4, 1929 (45 Stat. L. 1574), March 4, 1929 (45 Stat. L. 1639-1640), and May 4, 1930 (46 Stat. L. 291), and other acts amendatory thereof and supplemental thereto. That all of the lands within the Flathead Irrigation District are lands within the Flathead Indian Reservation, and were and are lands within the Flathead Irrigation Project. That subsequently and on or about the 12th day of May, 1928, the Flathead Irrigation District entered into a certain repayment contract between said Flathead Irrigation District and the United States of America, which said repayment contract contained terms and provisions required to be incorporated therein by the aforesaid Acts of Congress,

and subsequently and on the 12th day of July, 1928, said repayment contract was, by a judgment and decree of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Lake, duly given, made and entered on said date, duly confirmed, approved and ratified, and all proceedings in relations thereto duly confirmed, which decree became final, and that ever since the date aforesaid said repayment contract has been in full force and effect and this defendant has been under the obligation, and now is under the obligation, created thereby. That upon repayment by the said Flathead Irrigation District of the sum provided for in said repayment contract that portion of the Flathead Irrigation Project lying within and serving the lands within the Flathead Irrigation District will become the property of the Flathead Irrigation District.

V.

That under and pursuant to the aforesaid Acts of Congress, and the rules and regulations of the Secretary of the Interior relating to the Flathead Irrigation Project, the Flathead Irrigation District is required to collect from each of the landowners [53] within the said district using water a proportionate share of the cost of the operation and maintenance of the said Flathead Irrigation Project serving lands within the said district each year. That the intervener Dellwo, as a user of water from the Flathead Irrigation District and the Flathead

Irrigation Project, is required to pay to the Flathead Irrigation District each year his proportionate share of the operation and maintenance cost of said Flathead Irrigation Project; that such charges are so assessed and divided that each user of water within the said project pays operation and maintenance charges based upon the amount of lands irrigated by him from the said irrigation system.

VI.

That the Flathead Indian Reservation is a large reservation containing many thousands of acres of land. That streams course through the said reservation at various points therein. That the streams on the said reservation are relatively few, and are separated by large tracts of land in which there are no natural water courses. That for the economical irrigation of the greatest possible acreage upon the said reservation and in order to secure a just and equal distribution of the waters of said reservation, it was and is necessary that a central irrigation project be developed. That the irrigation of any great portion of the said reservation by means of private ditches privately owned and operated would be economically unfeasible, and that the only feasible method of irrigating the greatest possible number of acres of land on said reservation is through a system such as the Flathead Irrigation Project. That in the absence of a system such as the Flathead Irrigation Project system many thousands of acres of land would be and forever remain arid.

That the Flathead Irrigation Project is so designed to gather into a central collecting system all of the economically available waters of the said reservation to [54] store said waters so far as the same is economically possible, and to make available for irrigation by pumping waters which would not be otherwise available for the irrigation of any of the lands of the reservation. That said irrigation project is so designed and so constructed that the waters of the various streams, including Post Creek, coursing through the reservation are collected and distributed through a central irrigation system, and is so designed and constructed that use of water on one part of the said project system vitally affects the amount of water available for other parts of the project system. That as designed and constructed the said Flathead Project irrigation system does as nearly as possible provide a just and equal distribution of water to those securing water from and through said system. That the soil of the Flathead Indian Reservation is such and the climate of the Flathead Indian Reservation is such that the growth of crops without irrigation is not feasible, and that irrigation is required for the successful raising of crops thereon.

VII.

That at the time of the ratification of said treaty of July 16, 1855, and ever since said time continuing to the present, Post Creek was and is an existing, innavigable stream of water rising in the Mission mountains located on the Flathead Indian

Reservation in Montana, and flowing in a south-westerly direction through a well defined channel with natural banks, and in its natural course across lands of said reservation empties into Mission Creek at a point located within said reservation.

VIII.

That the defendant, B. W. Alexander, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Duncan McDonald Allotment No. 561: [55]

The East Half of the Northeast Quarter ($E\frac{1}{2} NE\frac{1}{4}$) of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

IX.

That the defendants, the Beckwith Mercantile Company, a Montana corporation, and John A. Hazel, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Florence McDonald Allotment No. 560:

The Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4} NE\frac{1}{4}$), and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4} SE\frac{1}{4}$), of Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

X.

That the defendants, Theodore Knutson and Edna I. Knutson, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Mary C. McDonald Allotment No. 559:

The Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ $NW\frac{1}{4}$), and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ $SW\frac{1}{4}$), Section Sixteen (16), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XI.

That the defendant, P. W. Sorensen, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Frank Fiddler Allotment No. 785:

The West Half of the Southwest Quarter ($W\frac{1}{2}$ $SW\frac{1}{4}$) of Section Sixteen (16) Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian. [56]

XII.

That the defendant, Avery A. Stevens, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the William Deschamps Allotment No. 781:

The Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ $NW\frac{1}{4}$) of Section Sixteen

(16), Township Nineteen (19) West, Montana Principal Meridian, and the Southeast Quarter of the Northeast Quarter ($SW\frac{1}{4}$ $NE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XIII.

That the defendants, Avery A. Stevens and Neil C. Pierce, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Edward Deschamps Allotment No. 783:

The East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XIV.

That the defendants, Bert Lish, Bert Myers Nelson and John Ellis, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Ora Deschamps Allotment No. 784:

The West Half of the Southeast Quarter ($W\frac{1}{2}$ $SE\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

That the defendant, J. A. McKeever, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Mon-

tana, formerly known as the Caroline McKeever Allotment No. 791:

The North Half of the Northwest Quarter ($N\frac{1}{2}$ $NW\frac{1}{4}$) of Section Twenty-one (21), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

[57]

XV.

That during the years 1935, 1936, 1937 and 1938, the defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Neil C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis and J. A. McKeever, and each of them, diverted from Post Creek through a private ditch known as the McDonald-Deschamps Ditch, for use on their lands a greater amount of water than their pro rata share of the natural flow of the waters of the reservation calculated on an irrigable acreage basis, and diverted a greater amount of natural flow of water per irrigable acre than was actually disbursed to those persons whose lands are included in the Flathead Irrigation District, and particularly the intervener Dellwo. That in taking such amounts of water the defendants have deprived the intervener Dellwo and other users under the Flathead Irrigation District of a portion of the water rightfully belonging to them. That none of the described lands of the defendants above named are within the Flathead

Irrigation Project and that none of said defendants have endeavored to bring said lands within said project.

XVI.

That the defendant, Axel Erickson, is in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Julia Minesinger Allotment No. 691:

The North Half of the Northwest Quarter ($N\frac{1}{2}$ NW $\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XVII.

That the defendants, John Minesinger and Ada B. Minesinger, his wife, are in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the John Minesinger Allotment No. 690: [58]

The South Half of the Northwest Quarter ($S\frac{1}{2}$ NW $\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XVIII.

That the defendant, Thomas Wald, is in possession and control of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the James Waymack Allotment No. 689:

The West Half of the Southwest Quarter ($W\frac{1}{2}$ $SW\frac{1}{4}$) of Section Seventeen (17), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XIX.

That the defendant, Thomas Wald, is also in control and possession of the following described lands lying within the Flathead Indian Reservation in Montana, formerly known as the Emma M. Magee Allotment No. 688:

The East Half of the Southeast Quarter ($E\frac{1}{2}$ $SE\frac{1}{4}$) of Section Eighteen (18), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian.

XX.

That during the years 1935, 1936, 1937 and 1938, the defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, and each of them, diverted from Post Creek through a private ditch known as the Magee-Minesinger Ditch, for use on their lands a greater amount of water than their pro rata share of the natural flow of the waters of the reservation calculated on an irrigable acreage basis, and diverted a greater amount of natural flow of water per irrigable acre than was actually disbursed to those persons whose lands are included in the Flathead Irrigation District, and particularly the intervener Dellwo. That in taking such amounts of water the defendants

have deprived the intervener Dellwo and other users under the Flathead Irrigation District of a portion of the water rightfully belonging to them. That none of the described lands of the defendants above named are within the Flathead Irrigation Project and that none of said defendants [59] have endeavored to bring said lands within said project.

XXI.

That the Secretary of the Interior, claiming to act under the laws of the United States relating to the Flathead Indian Reservation, purported to award and decree to the defendants certain water rights out of Post Creek for the lands owned by said defendants. That the Secretary purported to award to the said defendants the following amounts of water:

B. W. Alexander.....	2	acre	feet	per	annum	Total	33.6	acre	feet
Beckwith Mercantile Company and John									
A. Hazel	2	"	"	"	"	"	16.4	"	"
Theodore Knutson and Edna I. Knutson.....	2	"	"	"	"	"	6.4	"	"
P. W. Sorenson.....	2	"	"	"	"	"	36.6	"	"
Avery A. Stevens.....	2	"	"	"	"	"	33.2	"	"
Avery A. Stevens and Neil C. Pierce.....	2	"	"	"	"	"	20.6	"	"
Bert Lish, Bert Myers Nelson and John El- lis	2	"	"	"	"	"	28.2	"	"
J. A. McKeever.....	2	"	"	"	"	"	2.8	"	"
Axel Erickson	2	"	"	"	"	"	154.8	"	"

John Minesinger and Ada B. Minesinger...	2 acre feet per annum	Total 150.8 acre feet
Thomas Wald (James Waymack allotment)	2 " " " " " "	104.6 " "
Thomas Wald (Emma M. Magee allotment)	2 " " " " " "	160 " "

The Secretary of the Interior purported to give to said defendants the prior right to the use of the amounts of water as above set forth.

That the Secretary also purported to award a right which was fixed in amount and not dependent upon the flow of the streams within the reservation, but which allowed to said defendants, and each of them, the full extent of said right irrespective of the amount of water received by other persons owning lands within the [60] reservation.

XXII.

That the acts of the Secretary of the Interior in purporting to award said defendants the rights as above set forth, were wrongful and unlawful and in excess of the jurisdiction of the Secretary of the Interior, in that they violated the General Allotment Act, 25 U. S. C. A. 381, which provided that the Secretary should have power to make rules to procure a just and equal distribution of the waters of the Reservation and for the reason that any award of a private water right, which right is prior in time to the other rights on the said Reservation is not a just and equal distribution of the waters, but is an unjust and unequal distribution of the waters, in

that two acre feet per acre is in excess of the amount of natural flow of water generally delivered to other users on said reservation and particularly the intervenor Dellwo.

XXIII.

That the defendants, and each of them, have taken the amounts of water taken by them without regard to the officers in charge of the Flathead Irrigation Project, and have assumed to take such water as they deemed proper at such times and at such places as they deemed proper. That all of the users of water under the Flathead Irrigation District, including the intervenor Dellwo, are required to take their water from the central distributing system and required to take the same under the supervision of a Water Master appointed by the United States for the purpose of distributing the waters of said system. That by reason of the nature of said reservation and the natural distribution of the waters thereon the fact that the said defendants have taken said water without the consent of the said Water Master has made it impossible to determine the amounts of water which actually should be distributed to the intervenor Dellwo and to the other persons using water under the Flathead Irrigation Project within the Flathead Irrigation District. That the acts [61] of the defendants in taking water without the consent or knowledge of the Water Master have seriously interfered with the operation of said system and have resulted in a loss of water

which could be used and is needed for the irrigation of other reservation lands, all to the damage of the interveners herein.

XXIV.

That none of the said defendants, insofar as their lands are served by the Magee-Minesinger or McDonald-Deschamps ditches, are taking water under the supervision of the Secretary of the Interior but that all of the said defendants, insofar as they are irrigating lands from the said ditches, have taken and are taking water apart from the Flathead Irrigation Project and that the said defendants have not requested the delivery of water from the Flathead Irrigation Project for the lands served by said ditches.

XXV.

That the interveners have no plain, speedy or adequate remedy at law.

For Answer to the Bill of Complaint on File Herein, Intervenors Admit, Deny and Allege as Follows:

I.

Admit the allegations of Paragraphs I and II of said complaint.

II.

For answer to Paragraph III of said complaint, interveners admit that the United States, upon the establishment of the Flathead Indian Reservation, reserved for irrigation and other beneficial uses

the waters of said reservation and exempted from appropriation under territorial or state law or otherwise all of the waters of said reservation, including all of the waters of Post Creek which has its source and flows wholly within the boundaries of said reservation, but in this connection allege that the United States reserved said land, not as sole owner of the lands and waters thereon, but as trustee for the Flathead Tribe of Indians. [62]

III.

Admit the allegations of Paragraph IV of said bill of complaint.

IV.

Admit the allegations of Paragraph V of said bill of complaint.

V.

Admit the allegations of Paragraph VI of said bill of complaint.

VI.

For answer to Paragraph VII of said bill of complaint, interveners admit that the Secretary of the Interior, purporting to act pursuant to the Acts of Congress of June 21, 1906, and May 29, 1908, purported to recognize all early water right developments of the Indians and white settlers of the Flathead Indian Reservation in Montana which had been made prior to the year 1909. Admit that a committee appointed by the Secretary of the Interior made personal investigation on the ground of heard testimony and reviewed surveys made by

engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water right developments made prior to the year 1909. Admit that on the 10th day of December, 1919, the Committee reported to the Secretary of the Interior and made certain recommendations in accordance with the instructions of the Secretary of the Interior. Admit that the report of the said Committee and its recommendations were approved by said Secretary on November 25, 1921, except that the Secretary of the Interior did not accept the report of said committee in respect to operation and maintenance charges on said reservation. Deny that the Secretary of the Interior acted pursuant to law or in accordance with instructions issued pursuant to law. [63]

VII.

Admit that the defendant, B. W. Alexander, is in control of the lands described in Paragraph VIII of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Duncan McDonald Allotment No. 561, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and directly contrary to the controlling acts of Congress, and deny that the said Duncan McDonald Allotment No. 561 has or is en-

titled to any water right by virtue of the award of said Secretary of the Interior.

VIII.

Admit that the defendants, Beckwith Mercantile Company, a Montana corporation, and John A. Hazel, are in control of the lands described in Paragraph IX of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Florence McDonald Allotment No. 560, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling Acts of Congress, and deny that the said Florence McDonald Allotment No. 560, has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

IX.

Admit that the defendants, Theodore Knutson and Edna I. Knutson, his wife, are in control of the lands described in Paragraph X of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Mary C. McDonald, Allotment No. 559, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdic-

tion, and was directly contrary to the controlling Acts of Congress, and [64] deny that the said Mary C. McDonald Allotment No. 559 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

X.

Admit that the defendant, P. W. Sorensen, is in control of the lands described in Paragraph XI of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Frank Fiddler Allotment No. 785, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling Acts of Congress, and deny that the said Frank Fiddler Allotment No. 785 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XI.

Admit that the defendant, Avery A. Stevens, is in control of the lands described in Paragraph XII of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to William Deschamps Allotment No. 781, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the author-

ity of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling Acts of Congress, and deny that the said William Deschamps Allotment No. 781 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XII.

Admit that the defendants, Avery A. Stevens and Neil C. Pierce, are in control of the lands described in Paragraph XIII of said complaint. Admit that the Secretary of the Interior [65] attempted to grant a valid and subsisting water right on Post Creek to Edward Deschamps Allotment No. 783, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Edward Deschamps Allotment No. 783 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XIII.

Admit that the defendants, Bert Lish, Bert Myers Nelson and John Ellis, are in control of the lands described in Paragraph XIV of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Ora Deschamps Allotment No. 784, and in this connection allege that said purported action of

the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Ora Deschamps Allotment No. 784 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XIV.

Admit that the defendant, J. A. McKeever, is in control of the lands described in Paragraph XV of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Cheek to Caroline McKeever Allotment No. 791, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Caroline McKeever Allotment No. 791 has or is entitled to any water right by virtue of the award of [66] said Secretary of the Interior.

XV.

Admit that during the months of June, July, August and September of the irrigation season of the year 1935 said defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Ste-

vens, Neil C. Pierce, Bert Lish, Bert Myers Nelson and J. A. McKeever wrongfully and unlawfully diverted from Post Creek through a private ditch known as the McDonald-Deschamps Ditch 1,051.91 acre-feet of water. Admit that the defendants threatened to continue to unlawfully divert excessive amounts of the water of Post Creek and that unless enjoined and restrained will continue to so do. Deny that the said defendants were lawfully entitled to divert 166.8 acre-feet of water during the year 1935.

XVI.

Admit that the defendant, Axel Erickson, is in control of the lands described in Paragraph XVII of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Julia Minesinger Allotment No. 691, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction, and was directly contrary to the controlling acts of Congress, and deny that the said Julia Minesinger Allotment No. 691 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XVII.

Admit that the defendants, John Minesinger and Ada B. Minesinger, his wife, are in control of the lands described in Paragraph XVIII of said com-

plaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to John Minesinger Allotment No. 690, and in this connection allege that said purported action of the [67] Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling acts of Congress, and deny that the said John Minesinger Allotment No. 690 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XVIII.

Admit that the defendant, Thomas Wald, is in control of the lands described in Paragraph XIX of said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to James Waymack Allotment No. 689, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said James Waymack Allotment No. 689 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XIX.

Admit that the defendant, Thomas Wald, is in control of the lands described in Paragraph XX of

said complaint. Admit that the Secretary of the Interior attempted to grant a valid and subsisting water right on Post Creek to Emma M. Magee Allotment No. 688, and in this connection allege that said purported action of the Secretary of the Interior was void in that it was beyond the authority of the Secretary of the Interior and in excess of his jurisdiction and was directly contrary to the controlling Acts of Congress, and deny that the said Emma M. Magee Allotment No. 688 has or is entitled to any water right by virtue of the award of said Secretary of the Interior.

XX.

Admit that during the months of June, July, August and September of the irrigation season of the year 1935, said defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, wrongfully and unlawfully diverted [68] from Post Creek through a private ditch known as the Magee-Minesinger Ditch, 2,180.9 acre-feet of water. Admit that the defendants threaten to continue to unlawfully divert that excessive amount of the waters of Post Creek, and that unless enjoined and restrained will continue to so do. Deny that the said defendants were lawfully entitled to divert 570.2 acre-feet of water during the year 1935.

XXI.

For answer to Paragraph XXII of said bill of complaint, defendants admit that the Secretary of the Interior promulgated certain rules and regula-

tions in respect to persons on the Flathead Indian Reservation using water under the decree of the Secretary of the Interior. Admit that the rules and regulations were of the kind and character set forth in said Paragraph XXII. In this connection deny that the Secretary of the Interior had power to make the decree referred to in said Paragraph XXII.

XXII.

Admit the allegations of Paragraphs XXIII and XXIV of said Complaint.

XXIII.

For answer to Paragraph XXV of said complaint, defendants admit the allegations thereof, but in this connection allege that the defendants do not have the right to divert the amounts of water allowed by the Secretary of the Interior as aforesaid.

XXIV.

For answer to Paragraph XXVI of said complaint, interveners admit the allegations thereof, but in this connection allege that the defendants, in diverting the amounts of water purported to be awarded by the Secretary of the Interior, have taken more water than they are by law allowed or entitled to take. [69]

XXV.

Admit the allegations in Paragraph XXVII and XXVIII of said complaint.

Wherefore, Interveners Pray:

I. That the defendants, and each of them, be enjoined and restrained from taking or diverting any water from Post Creek, or in the alternative,

II. That it be decreed that the said defendants have no right to the waters of Post Creek over and above the pro rata share of each of said defendants to all of the normal flow of the waters of the reservation calculated on irrigable acreage basis.

III. That said defendants, and each of them, be restrained from taking more than the pro rata share of water of each of said defendants, said share to be determined by calculating the entire available supply of normal flow of water for said reservation in acre feet and the entire irrigable acreage on said reservation to be served and dividing the former by the latter and multiplying the result by the number of irrigable acres in the lands of each of said defendants as described herein, and in conjunction with Paragraphs III of this prayer.

IV. That it be adjudicated and decreed that the defendants have no right to take said waters apart from the deliveries made to them by the agents of the United States in charge of said Flathead Irrigation Project, and that the said defendants be restrained from taking any water to which they may be entitled except as the same is delivered to them by the agents of the United States in charge of the Flathead Irrigation District.

V. For such other and further relief as may be just.

VI. For interveners' costs herein expended.

RUSSELL E. SMITH,

Missoula, Montana,

Attorney for Intervenors.

[Endorsed]: Filed July 20, 1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[70]

Thereafter, on July 31, 1939, the Answer of Plaintiff to Complaint in Intervention & Reply to Answer of Intervenors was duly filed herein, in the words and figures following, to wit: [71]

[Title of District Court and Cause.]

ANSWER OF PLAINTIFF, UNITED STATES
OF AMERICA TO COMPLAINT OF INTERVENERS,
THE FLATHEAD IRRIGATION DISTRICT AND DENNIS A.
DELLWO, AND REPLY TO ANSWER OF INTERVENERS
TO COMPLAINT OF PLAINTIFF.

Comes now the United States of America, plaintiff in the above entitled action, and for its answer to the complaint in intervention and for its reply to the answer to its bill of complaint by the intervenors, Flathead Irrigation District, a corporation, and Dennis A. Dellwo, on file herein, alleges:

I.

Plaintiff admits the allegations contained in paragraphs I and II of the complaint of the Interveners.

II.

Plaintiff admits the allegations contained in paragraph III of the interveners of the complaint from the beginning thereof to line 13, on page 3, paragraph III, of said complaint.

Plaintiff denies each and every allegation contained in said paragraph III, commencing with line 13 and ending with the word "United States" in line 21 on page 3, paragraph III, of said complaint.

Plaintiff admits the allegations contained from line 21 on page 3 of said complaint to the end of paragraph III, line 8, page 4 of said complaint.

III.

Plaintiff admits the allegations contained in paragraphs IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, and XIV of the interveners of the complaint.

IV.

Plaintiff admits the allegations contained in paragraph XV of the interveners of the complaint, but in relation to the matters set out in said paragraph, plaintiff alleges that [72] the said defendants, B. W. Alexander, Beckwith Mercantile Company, a Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert

Myers Nelson, John Ellis and J. A. McKeeever have during the months of June, July, August, and September of the irrigation season in the year 1935 wrongfully, and unlawfully diverted from Post Creek for the irrigation of their lands described in said complaint of interveners through a private ditch known as the McDonald-Deschamps Ditch, 1,051.91 acre feet of water; that said amount of water was diverted wrongfully and unlawfully and was in excess of the amount of water allocated said lands under decrees of the Secretary of the Interior of the United States of America made on November 25, 1921.

V.

Plaintiff admits the allegations contained in paragraphs XVI, XVII, XVIII and XIX of the interveners of the complaint.

VI.

Plaintiff admits the allegations contained in paragraph XX of the interveners of the complaint, but in relation to the matters therein set out in said paragraph, alleges that the said defendants, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, have during the months of June, July, August, and September of the irrigation season in the year 1935 wrongfully and unlawfully diverted from Post Creek for the irrigation of their lands described in said complaint of interveners through a private ditch known as the

Magee-Minesinger Ditch, 2180.9 acre feet of water; that said amount of water was diverted wrongfully and unlawfully and was in excess of the amount of water allocated said lands under decrees of the Secretary of the Interior of the United States of America made on November 25, 1921. [73]

VII.

Plaintiff, answering paragraph XXI of the complaint of the interveners, alleges that the water rights set opposite the names of each defendant are true and correct, and alleges further that the Secretary of the Interior acted with authority of law in making such grants and awards to the defendants' predecessors and their lands involved herein, in pursuance to the authority vested in him by the acts of Congress of June 21, 1906 (34 Stat. 354) and May 29, 1908 (35 Stat. 448). Plaintiff denies each and every other allegation therein contained.

VIII.

Plaintiff denies each and every allegation contained in paragraph XXII of the interveners of the complaint.

IX.

Plaintiff admits the allegations contained in paragraphs XXIII, XXIV and XXV of the interveners of the complaint.

X.

Plaintiff admits the allegations contained in paragraph II of the answer of the interveners to plaintiff's bill of complaint on file herein.

XI.

Plaintiff, replying to paragraph VI of the *interveners* of the *answer* to plaintiff's complaint alleges that all acts done by the Secretary of the Interior in respect to the water rights involved herein were done in pursuance to law and in accordance with instructions issued pursuant to law.

XII.

Plaintiff, replying to the allegations contained in paragraphs VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXIII, and XXIV of the answer of the *interveners* to plaintiff's complaint, on file herein, alleges that all acts of the Secretary of the Interior in granting water [74] rights to each of the defendants' predecessors and their lands involved herein, were within the authority of the Secretary of the Interior, within his jurisdiction and done in pursuance to the Acts of Congress of June 21, 1906 (34 Stat. 354) and May 29, 1908 (35 Stat. 448).

XIII.

Plaintiff denies each and every allegation contained in the complaint in intervention of *interveners* and in the answer of *interveners* to the complaint of plaintiff, not herein specifically admitted, qualified, or denied.

Wherefore plaintiff, having fully answered the complaint of *interveners* and having fully replied to the answer of *interveners* to plaintiff's complaint,

the plaintiff, the United States of America, renews the prayer for relief fully set out and contained in the plaintiff's complaint against the said defendants on file herein.

JOHN B. TANSIL,

United States Attorney for
the District of Montana.

KENNETH R. L. SIMMONS,

District Counsel, U. S. I. I. S.,
Department of the Interior.

[Verification]

[Endorsed]: Filed July 31-1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[75]

Thereafter, on September 23, 1939, defendants filed their Motion to Dismiss the Complaint in Intervention herein, in the words and figures following, to wit: [76]

[Title of District Court and Cause.]

MOTION TO DISMISS COMPLAINT
IN INTERVENTION

Come Now the defendants B. W. Alexander, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, and move the Court as follows:

1. To dismiss the Complaint in Intervention because the said Complaint fails to state a claim against these defendants, or either or any of them, upon which relief can be granted.

LLOYD I. WALLACE,

Polson, Montana,

Attorney for Moving

Defendants.

[Endorsed]: Filed Sept. 23-1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[77]

Thereafter, on October 23, 1939, a Praecipe to Dismiss Complaint in Intervention as to Defendants J. A. McKeever, John Minesinger and Ada B. Minesinger was duly filed herein, in the words and figures following, to wit: [78]

[Title of District Court and Cause.]

PRAECIPE

To the Above Entitled Court:

Please dismiss the complaint in intervention in the above entitled action insofar as, and only insofar as the same relates to J. A. McKeever, John Minesinger and Ada B. Minesinger.

Dated this 23rd day of October, 1939.

RUSSELL E. SMITH,

Attorney for Intervenors.

[Endorsed]: Filed Oct. 23-1939. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[79]

Thereafter, on March 21, 1940, the Answer of Defendants to Complaint in Intervention was duly filed herein, in the words and figures following, to wit: [80]

[Title of District Court and Cause.]

JOINT AND SEVERAL ANSWER OF DEFENDANTS, BECKWITH MERCANTILE COMPANY, A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE KNUTSON AND EDNA I. KNUTSON, HIS WIFE, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT MYERS NELSON, AND THOMAS WALD, TO COMPLAINT IN INTERVENTION.

Come Now the defendants, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce, Bert Myers Nelson and Thomas Wald, and for their joint and several answer to the Complaint in Intervention on file herein, admit, deny and allege:

First Defense

I.

Allege that the said Complaint in Intervention fails to state a claim against these answering defendants, or either or any of them, upon which relief can be granted.

Second Defense

I.

Defendants deny that Dennis A. Dellwo is the owner of the land described in paragraph I of the Complaint in Intervention and deny that he is the successor in interest of Frederick Gariepy; admit the other allegations contained in said paragraph I.

II.

Admit the allegations contained in paragraph II.

III.

Admit that by virtue of the treaty made, ratified and proclaimed, as alleged in paragraph III, the Confederated Tribes of Flathead, Kootenai, and Upper Pend d'Oreille Indians conveyed to the United States their rights in and to a large portion of the country then occupied and claimed by them; deny that the United [81] States set aside and reserved the lands described in the treaty for the exclusive use, benefit and occupancy of the said Confederated Tribes; deny that the United States reserved the waters flowing within the confines of the former Flathead Indian Reserve; admit that the United States became trustee of said waters for the benefit of said Indians; allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations of the adoption of a policy looking to the ultimate irrigation of the lands on said reserve through a central irrigation system, and the purpose of the mak-

ing of surveys and plans; admit that in 1908 Congress appropriated \$50,000.00 for the purposes stated therein and allege that the cost of said entire work was to be reimbursed from the proceeds of the sale of lands within said reserve; deny that the United States appropriated and reserved all or any of the waters of the said Flathead Irrigation District; deny that the United States or the Act of Congress (35 Stat. L. 448) provided that all water rights on the Flathead Indian Reservation should be taken from systems of irrigation to be constructed by the United States; admit that the Act of Congress of May 29, 1908, provided that the lands irrigable under the systems therein provided; which had been allotted to the Indians in severalty, should be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems; deny that said Act of Congress provided that all lands allotted to Indians and all surplus in allotted lands should bear their pro rata share of the cost and operation and maintenance of the system under which they lie; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph IV. [82]

IV.

Defendants admit that all of the lands within the Flathead Irrigation District were and are lands within the former Flathead Indian Reservation;

allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph IV.

V.

Allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph V.

VI.

Admit that the former Flathead Indian Reservation was a large reserve containing many thousands of acres of land and that streams course through the same at various points; admit that the soil and climate of the former Flathead Indian Reservation are such that irrigation is required for the successful raising of crops thereon to the full extent thereof; allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained in paragraph VI.

VII.

Admit the allegations contained in paragraph VII.

VIII.

Admit that the defendant, B. W. Alexander, is in control and possession of the land described in paragraph VIII, formerly known as the Duncan McDonald Allotment No. 561.

XVI.

Deny the allegations contained in paragraph XVI.

XVII.

Admit that the defendant, Ada B. Minesinger, is in possession and control of the land described in paragraph XVII, formerly known as the John Minesinger Allotment No. 690.

XVIII.

Admit that the defendant, Thomas Wald, is in possession and control of the land described in paragraph XVIII, formerly known as the James Waymack Allotment No. 689.

XIX

Admit that the defendant, Thomas Wald, is also in control and possession of the land described in paragraph XIX, formerly known as the Emma M. Magee Allotment No. 688.

XX.

Deny the allegations contained in paragraph XX.

XXI.

Deny the allegations contained in paragraphs XXI, XXII, XXIII, XXIV and XXV.

XXII.

Except as hereinbefore specifically admitted, qualified or denied, defendants deny each and every allegation, matter, statement and thing, and each

and every part and portion thereof, in said Complaint in Intervention contained. [85]

Third Defense

For a third and separate defense, these answering defendants allege:

I.

That on the 16th day of July, 1855, a treaty was made and entered into by and between the United States of America and the Confederated Tribes of Flathead, Kootenai and Upper Pend d'Oreille Indians, wherein and whereby the said Indians ceded, relinquished and conveyed to the United States all their right, title and interest in and to a large tract of land then occupied and claimed by them, reserving therefrom, however, the land described in Article 2 of said treaty as a general Indian reservation and for their own use and benefit and occupation; which said treaty was ratified by the Senate of the United States on March 8, 1859, and regularly proclaimed by the President of the United States on April 15, 1859, a copy of which treaty, marked "Exhibit A", is hereto attached, here referred to and by this reference made a part hereof, the same as though fully written out at this place.

II.

That shortly thereafter and pursuant to the terms of such treaty, said Indians removed to and settled upon such Flathead Indian Reservation and, in

keeping with the meaning and intent of said treaty, many of them began the selection of home sites and the building of homes thereon, the breaking and clearing of ground, the digging of ditches, the irrigating of parts of said lands and the raising of crops thereon, and have continued to irrigate such lands and cultivate the same to the present time.

III.

That the land embraced within the limits of the former [86] Flathead Indian Reservation were and are arid in character and require artificial irrigation in order to produce crops thereon to the full extent of the soil thereof, and that the lands of the defendants, hereinafter mentioned and described, generally require one inch per acre at all times for the proper irrigation thereof and the successful raising of crops thereon, and were and are capable of being irrigated from the waters of Post Creek located in said reservation; that under the said treaty of July 16, 1855, the waters within the Flathead Indian Reservation, including the waters of Post Creek, were reserved to the Indians for the equal benefit of the tribal members for irrigation and other purposes.

IV.

That on April 23, 1904, the Congress of the United States passed an Act (33 Stat. L. 302), providing for the survey and allotment of the lands embraced within the limits of the said Flathead Indian

Reservation in the State of Montana, under the Allotment Laws of the United States (Act of Feb. 8, 1887, as amended), and the sale and disposal of all surplus lands after allotment.

V.

That in the year 1908, Florence McDonald, Mary C. McDonald, Frank Fiddler, William Deschamps, Edward Deschamps, Oro Deschamps, James Waymack and Emma M. Magee, were members of the Flathead Confederated Tribe of Indians (or Nation) and were residing on the Flathead Indian Reservation.

VI.

That sometime prior to the time 1908, the Indians named in the preceding paragraph selected, pursuant to the said treaty and the aforesaid Acts of Congress, as their individual [87] allotments and on the 8th day of October, 1908, the United States, through its special allotting agent or agents, duly and regularly allotted to said Indians and as their individual property, the tracts of land so selected by them and described as follows, to-wit:

To Florence McDonald, No. 560:

The Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter, Section Sixteen, Township Nineteen North, Range Nineteen West, M. P. M.

To Mary C. McDonald, No. 559:

The Southeast Quarter of the Northwest Quarter and the Northeast Quarter of the Southwest Quarter, Section Sixteen, Township Nineteen North, Range Nineteen West, M. P. M.

To Frank Fiddler, No. 785:

The West Half of the Southwest Quarter, Section Sixteen, Township Nineteen North, Range Nineteen West, M. P. M.

To William Deschamps, No. 781:

The Southwest Quarter of the Northwest Quarter, Section Sixteen; and the Southeast Quarter of the Northeast Quarter of Section Seventeen; Township Nineteen North, Range Nineteen West, M. P. M.

To Edward Deschamps, No. 783:

The East Half of the Southeast Quarter, Section Seventeen, Township Nineteen North, Range Nineteen West, M. P. M.

To Oro Deschamps, No. 784:

The West Half of the Southeast Quarter, Section Seventeen, Township Nineteen North, Range Nineteen West, M. P. M.

To James Waymack, No. 689:

The West Half of the Southwest Quarter, Section Seventeen, Township Nineteen North, Range Nineteen West, M. P. M.

To Emma M. Magee, No. 688:

The East Half of the Southeast Quarter
of Section Eighteen, Township Nineteen
North, Range Nineteen West, M. P. M.

VII.

That thereafter the United States, by fee simple patent, conveyed said allotted lands, together with all the rights, privileges, [88] immunities and appurtenances of whatsoever nature thereunto belonging, to said Flathead Indians, and to their heirs and assigns forever, the lands so conveyed to each of said Indians being the same tracts of land as were so allotted to him or her; that the said lands so allotted to Florence McDonald were so conveyed to her by patent, dated November 5, 1917; that the said lands so allotted to Mary C. McDonald were so conveyed to her by patent, dated November 17, 1915; that the said lands so allotted to Frank Fiddler were so conveyed to him by patent, dated September 2, 1925; that the said lands so allotted to William Deschamps were conveyed to Joseph Deschamps and Mary Rodgers Deschamps, as the heirs of William Deschamps, deceased, by patent, dated August 16, 1920; that the said lands so allotted to Edward Deschamps were so conveyed to him by patent, dated November 9, 1910; that the said lands so allotted to Oro Deschamps were so conveyed to Oro Deschamps Freeman (formerly Oro Deschamps) by patent, dated March 8, 1917; that the said lands so allotted to James Waymack were

so conveyed to him by patent, dated October 10, 1910; and that the lands so allotted to Emma M. Magee were so conveyed to her by patent, dated August 25, 1916.

VIII.

That on or about May 1, 1905, the said Florence McDonald, Mary C. McDonald, Frank Fiddler, William Deschamps, Edward Deschamps and Oro Deschamps, dug and constructed, or caused to be dug and constructed, what is known as the McDonald-Deschamps ditch, which ditch taps Post Creek on its left bank in Section Ten, Township Nineteen North, Range Nineteen West, M. P. M. for the purpose of diverting and conveying water from said Post Creek to irrigate the lands of said Indians, so selected by them and afterwards [89] allotted to them, and that said ditch so constructed by the predecessors in interest of these answering defendants was, at the time of its construction and ever since then has been and now is, of such size and grade as to carry the required amount of water to, over and upon said lands to properly irrigate the same; that ever since said date the predecessors in interest of the defendants, Beckwith Mercantile Company, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce, and Bert Myers Nelson, and the said defendants have continually and said defendants now are maintaining said ditch and diverting and conveying water through the same from

Post Creek and irrigating the irrigable areas of their respective lands with said waters.

IX.

That on or about the 1st day of May, 1906, the said James Waymack and Emma M. Magee dug and constructed, or caused to be dug and constructed, an extension to the ditch known as the Magee-Minesinger ditch which taps Post Creek on its left bank in Section Ten, Township Nineteen North, Range Nineteen West, M. P. M., for the purpose of diverting and conveying water from said Post Creek to irrigate the lands of said Indians, so selected by them and afterwards allotted to them, and that said ditch and the extension thereof so constructed by the predecessors in interest of these answering defendants was, at the time of its construction and ever since has been and now is, of such size and grade as to carry the required amount of water to, over and upon said lands to properly irrigate the same; that ever since said date the predecessors in interest of the defendant, Thomas Wald, and said defendant have continually, and the defendant, Thomas Wald, now is maintaining said ditch and diverting and conveying [90] water through the same from Post Creek and irrigating the irrigable portions of his said lands with said water.

X.

That when the said Indians dug and constructed the said ditches and diverted and applied water

from Post Creek to the irrigation of the lands so selected by them, and when the said lands were so allotted to said members of the Flathead Nation, as set forth herein, the waters of the Flathead Indian Reservation, including the waters of Post Creek, were reserved under the said treaty of 1855 to each individual Indian named in paragraph V of this affirmative defense, in such amount as is or might be needed for the beneficial use for each of the said Indians in irrigating the said lands so allotted to each of them, and for stock, domestic and other beneficial purposes. That thereupon each of said Indian allottees was vested with a right as of the date of said treaty (July 16, 1855) in the use of sufficient water to properly irrigate his or her irrigable land, and that each of said Indian allottees was vested with the rights incident to ownership of both the land and said waters, which right to said waters thereby became appurtenant to the land so allotted to each said Indian.

XI.

That after the lands described above were allotted to the Indians named and after the reserved waters became vested in each of said Indians, as hereinbefore set forth, and after the said waters became appurtenant to each specific tract of land, as hereinbefore described, and by mesne conveyances from said original patentees and their respective successors in interest, these answering defendants have

acquired by purchase the legal title to said lands, together with all the tenements, hereditaments [91] and appurtenances of whatsoever nature thereunto belonging or in anywise appertaining, on the dates and as follows:

The Florence McDonald Allotment No. 560 was conveyed to the Beckwith Mercantile Company, a corporation, by warranty deed, dated October 25, 1921, and that defendant, Beckwith Mercantile Company, contracted to sell said land on August 22, 1934, to Clarence L. McVey and that the defendant, John A. Hazel, is occupying said land as a tenant of said McVey.

The Mary C. McDonald Allotment No. 559 was conveyed to the defendants, Theodore Knutson and Edna I. Knutson, his wife, by a contract for deed, dated October 8, 1934;

That the Frank Fiddler Allotment No. 785 was conveyed to the defendant, P. W. Sorenson, by warranty deed, dated November 9, 1928;

That the William Deschamps Allotment No. 781 was conveyed to the defendant, Avery A. Stevens, by warranty deed, dated January 26, 1935;

That the North thirty acres of the Edward Deschamps allotment No. 783 were conveyed to the defendant, Avery A. Stevens, by warranty deed, dated October 4, 1931, and that the South fifty acres of said allotment were conveyed to the defendant, Meil C. Pierce, by warranty deed, dated May 21, 1935;

That the North forty acres of the Oro Deschamps Allotment No. 784 were conveyed to the defendant, Bert Myers Nelson, by warranty deed, dated October 14, 1926, and that the South forty acres of said allotment were conveyed to said defendant by warranty deed, dated April 7, 1939;

That the James Waymack Allotment No. 689 was conveyed to the defendant, Thomas Wald, by warranty deed, dated March 24, 1917;

That the Emma M. Magee Allotment No. 788 was conveyed to the defendant, Thomas Wald, by warranty deed, dated March 24, 1917; [92]

And that ever since then these answering defendants have been and now are the owners and in possession of said tracts of land, together with all rights, privileges, immunities, water rights, tenements, hereditaments and appurtenances thereunto belonging.

XII.

That because of the foregoing facts these answering defendants are entitled to the use of a sufficient amount of water from Post Creek to properly irrigate their respective lands to the same extent as the individual Indians herein mentioned, predecessors in interest of these answering defendants, would be entitled under said treaty of July 16, 1855, if they had not conveyed said lands, together with the tenements, hereditaments and appurtenances thereunto belonging, to these answering defendants, and are equally entitled to the right to

use said waters as if they were members of the Flathead Nation and are entitled to use a sufficient amount of said water to properly irrigate their lands without hindrance or interference by the plaintiff or interveners, or either of them, or their agents and servants, and that they are entitled to use such waters whether their lands are under a Government ditch or not.

XIII.

These answering defendants are informed and believe and upon such information and belief state, that at the time of the making of the said treaty of 1855, there was, every since has been and now is, a supply of water available on the former Flathead Indian Reservation, sufficient to properly irrigate all the irrigable lands selected by and allotted to the Indians in severalty, upon the said Flathead Indian Reservation pursuant to the Act of Congress of April 23, 1904, as amended. [93]

Fourth Defense

For a fourth and separate defense, these answering defendants allege:

I.

That if the Secretary of the Interior acted erroneously under the Act of May 29, 1908, or any other Act of Congress, in recognizing the early private water rights of the Indian members of the Flathead Nation, or that if the said Secretary of the Interior

acted erroneously in determining or allocating water rights to said Indians, or to the lands described in the Complaint in Intervention, the only error committed by said Secretary of the Interior was and is that he ought to and should have recognized, determined or allocated water rights to the whole irrigable area of each Indian allotment in an amount as may be required to properly irrigate such lands.

Fifth Defense

For a fifth and separate defense, these answering defendants allege:

I.

These answering defendants here repeat and allege all of the matters, facts and things set forth and alleged in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of their "Third Defense" and above set forth and alleged in this Answer, and pray that the same be taken and deemed a part of this "Fifth Defense" the same as though herein set out and alleged at length.

II.

And that ever since the construction of said McDonald-Deschamps and Magee-Minesinger ditches, and for more than ten years immediately preceding the filing of the Complaint in Intervention, these answering defendants, and each of them, and their respective grantors and their predecessors in interest, have main- [94] tained and used said ditches

during all of said time, have diverted and used said waters from Post Creek for irrigation and other domestic purposes upon their respective lands, continuously, openly, notoriously, peaceably, uninterruptedly, under claim of right (as their own) and adversely to the said interveners and their grantors and predecessors, and to all the world; and during all said times these answering defendants and their respective grantors and predecessors in interest have been, and these defendants now are, as to their said respective lands, the owners of the right so to maintain and use said ditches and to divert and use a sufficient amount of the waters of Post Creek to properly irrigate their respective lands, as a perpetual easement appurtenant to their said lands.

Wherefore, these answering defendants pray:

(1) That the Complaint in Intervention be dismissed and that said interveners take nothing thereby.

(2) That it be adjudged and decreed that these answering defendants, and each of them, are the owners of and entitled to the use of the McDonald-Deschamps and Magee-Minesinger ditches and that they and each of them are the owners of and entitled to divert, convey and use the waters of Post Creek for irrigation and other domestic purposes, in an amount sufficient to properly irrigate the full irrigable area of their respective lands to the full extent of the soil thereof.

(3) For such other and further relief as may be just.

(4) For their costs and disbursements herein expended.

LLOYD I. WALLACE

Polson, Montana

Attorney for Answering Defendants.

(Verification) [95]

EXHIBIT "A"

TREATY WITH THE FLATHEADS, ETC. 1855

Articles of agreement and convention made and concluded at the treaty-ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, head-men and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead Nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, head-men, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognize Victor, as said head chief.

Article 1. The said confederated tribe of Indians hereby cede, relinquish, and convey to the United States all their rights, title, and interest in and to the country occupied or claimed by them, bounded and described as follows, to wit:

Commencing on the main ridge of the Rocky Mountains at the forty-ninth (49) parallel of latitude, thence westerly on that parallel to the divide between the Flat-bow or Kootenai river and Clarke's Fork, thence southerly and southeasterly along said divide to the one hundred and fifteenth degree of longitude, (115°), thence in a southwesterly direction to the divide between the sources of the St. Regis Borgia and the Coeur d'Alene rivers, thence southeasterly and southerly along the main ridge of the Bitter Root Mountains to the divide between the headwaters of the Koos-koos-kee river and of the southwestern fork of the Bitter Root River, thence easterly along the divide separating the waters of the several tributaries of the Bitter Root river from the waters flowing [96] into the Salmon and Snake rivers to the main ridge of the Rocky Mountains, and thence northerly along the said main ridge to the place of beginning.

Article 2. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general indian reservation, upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes parties to this treaty, under

the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River, thence along the divide separating the waters flowing into the Bitter Root river from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to and along the divide bounding on the west the Flathead river to a point due west from the point half-way in latitude between the northern and southern extremities of Flathead lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the Superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of this treaty. In the meantime [97] it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the

United States, and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named. And provided, that any substantial improvements heretofore made by any Indian, such as fields enclosed and cultivated and houses erected upon the lands hereby ceded, and which he may be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President of the United States, and payment made therefor in money, or improvements of an equal value be made for said Indian upon the reservation; and no Indian will be required to abandon the improvements aforesaid, now occupied by him, until their value in money or improvements of an equal value shall be furnished him as aforesaid.

Article 3. And provided, that if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them, as also the right in common with citizens of the United States to travel upon all public highways.

The exclusive right of taking fish in all the streams running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed

places in common with citizens of the Territory, and of erecting temporary buildings for curing; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 4. In consideration of the above cession, the United States agrees to pay to the said confederated tribes of Indians, [98] in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of One Hundred and Twenty Thousand Dollars in the following manner—that is to say: for the first year after the ratification hereof, thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year.

All which said sums of money shall be applied to the use and benefit of the said Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them. and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agree to establish at suitable points within the said reservation, within one year after the ratification hereof, an agricultural and industrial school, erecting the necessary buildings, keeping the same in repair, and providing it with furniture, books, and stationery, to be located at the agency, and to be free to the children of the said tribes. and to employ a suitable instructor or instructors. To furnish one blacksmith shop, to which shall be attached a tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop; and to keep the same in repair; and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker for the instruction of the Indians in trades, and to assist [99] them in the same. To erect one saw-mill and one flouring-mill, keeping the same in repair and furnished with the necessary tools and fixtures. and to employ two millers. To erect a hospital, keeping the same in repair, and provided with the necessary medicines and furniture. and to employ a physician: and to erect, keep in repair, and provide the necessary furniture the buildings required for the accommodation of said employees. The said buildings and establishments to be maintained and kept in repair as aforesaid, and the employees to be kept in service for the period of twenty years.

And in view of the fact that the head chiefs of the said confederated tribes of Indians are expected

and will be called upon to perform many services of a public character, occupying much of their time, the United States further agrees to pay to each of the Flathead, Kootenay, and Upper Pend d'Oreilles tribes five hundred dollars per year, for the term of twenty years after the ratification hereof, as a salary for such persons as the said confederated tribes may select to be their head chiefs, and to build for them at suitable points on the reservation a comfortable house, and properly furnish the same, and to plough and fence for each of them ten acres of land. The salary to be paid to, and the said houses to be occupied by, such head chiefs so long as they may be elected to that position by their tribes, and no longer.

And all the expenditures and expenses contemplated in this article of this treaty shall be defrayed by the United States, and shall not be deducted from the annuities agreed to be paid to said tribes. Nor shall the cost of transporting the goods for the annuity payments be a charge upon the annuities, but shall be defrayed by the United States.

Article 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the [100] same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home; on the same terms and subject to the

same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Article 7. The annuities of the aforesaid confederated tribes of Indians shall not be taken to pay the debts of individuals.

Article 8. The aforesaid confederated tribes of Indians, acknowledge their dependence upon the government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the agent, the property taken shall be returned, or, in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities. Nor will they make war upon any other tribe except in self defense, but will submit all matters of difference between them and other Indians to the government of the United States or its agent, for decision, and abide thereby. And if any of the said Indians commit any depredations on any other Indians within the jurisdiction of the United States, the same rule shall prevail as that prescribed in this article, in case of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Article 9. The said confederated tribes desire to exclude from their reservation the use of ardent

spirits, and to prevent their people from drinking the same; and therefore it is provided that any Indian belonging to said confederated tribes of Indians who is guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities [101] withheld from him or her for such time as the President may determine.

Article 10. The United States further agree to guarantee the exclusive use of the reservation provided for in this treaty, as against any claims which made be urged by the Hudson Bay Company under the provisions of the treaty between the United States and Great Britain of the fifteenth of June, eighteen hundred and forty-six, in consequence of the occupation of a trading post on the Pru-in river by the servants of that company.

Article 11. It is, moreover, provided that the Bitter Root Valley, above the Loo-lo Fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribe. No portion of the Bitter Root Valley, above the Loo-lo Fork, shall be opened to settlement until such examination is had and the decision of the President made known.

Article 12. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, and the undersigned head chiefs, chiefs, and principal men of the Flathead, Kootenay and Upper Pend d'Oreilles tribes of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

ISAAC I. STEVENS, (L.S.)
Governor and Superintendent Indian
Affairs, W.T.

VICTOR,

head chief of the Flathead Nation,

his X mark (L.S.)

ALEXANDER,

chief of the Upper Pend d'Oreilles,

his X mark (L.S.)

MICHELLE,

chief of the Kootenays,

his X mark (L.S.) [102]

AMBROSE,

his X mark (L.S.)

PAH-SOH,

his X mark (L.S.)

BEAR TRACK,

his X mark (L.S.)

ADOLPHE,

his X mark (L.S.)

THUNDER,

his X mark (L.S.)

BIG CANOE,

his X mark (L.S.)

KOOTEL CHAH,

his X mark (L.S.)

PAUL,

his X mark (L.S.)

ANDREW,

his X mark (L.S.)

MICHELLE,

his X mark (L.S.)

BATTISTE,

his X mark (L.S.)

KOOTENAYS

GUN FLINT,

his X mark (L.S.)

LITTLE MICHELLE,

his X mark (L.S.)

PAUL SEE,

his X mark (L.S.)

MOSES,

his X mark (L.S.)

JAMES DOTY,

Secretary.

R. H. LANSDALE,

Indian Agent.

W. H. TAPPAN,

Sub. Indian Agent

HENRY R. CROSIRE,
GUSTAVUS SOHON,
Flathead Interpreter.
A. J. HOECKEN,
sp. mis.
WILLIAM CRAIG.

[Endorsed]: Filed March 21, 1940. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [103]

Thereafter, on April 15, 1940, the Interveners' Reply to defendants' Answer to Complaint in Intervention was duly filed herein, in the words and figures following, to wit: [104]

REPLY OF INTERVENERS, FLATHEAD IRRIGATION DISTRICT AND DENNIS A. DELLWO TO JOINT AND SEVERAL ANSWERS OF BECKWITH MERCANTILE COMPANY, A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE KNUTSON, EDNA I. KNUTSON, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT MYERS NELSON, AND THOMAS WALD, TO COMPLAINT IN INTERVENTION.

Come now the interveners above named and for reply to the joint and several answers of the defendants on file herein, admit, deny and allege as follows:

For Reply to the Third Defense:

I.

Admit the allegations of Paragraph I of the third defense.

II.

Admit that shortly after the ratification of the treaty many of said Indians removed to and settled upon the Flathead Indian Reservation. Interveners are without any knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph II of said third defense.

III.

Admit that the land embraced within the limits of the former Flathead Indian Reservation were and are arid in character and require artificial irrigation in order to produce crops thereon to the full extent of the soil thereof. Admit that the lands of the defendants are capable of being irrigated from the waters of Post Creek, located on said reservation. Admit that under the treaty of July 16, 1855, the waters within the Flathead Indian Reservation were reserved for the benefit of the Confederate Tribes of Indians to be located on the Flathead Indian Reservation, but in this connection allege that such reservation was made for the benefit of the Indians as a tribe and not to the individual members thereof. Deny that the lands of the defendants require one inch per acre for the proper irrigation thereof.

IV.

Admit the allegations of Paragraph IV of said third defense.

V.

Admit the allegations of Paragraph V of said third defense.

VI.

Admit that on the 8th day of October, 1908, the Indians named in Paragraph V of said answer were allotted the tracts of land described in said Paragraph VI of said answer. Allege that the interveners do not have sufficient knowledge or information to form a belief as to the truth of the allegations with respect to the dates of the selection of the said allotments, and in this connection allege that no ownership in severalty in any of the Indians or persons mentioned in Paragraph VI of said third defense occurred until the date of the allotment, to-wit: October 8, 1908.

VII.

Admit that the United States subsequently by fee simple patent conveyed said allotted lands unto the Flathead Indians or their heirs. Allege that the interveners do not have sufficient knowledge or information to form a belief with respect to the remaining allegations of Paragraph VII of said third defense.

VIII.

Admit that some person or persons unknown to

interveners dug and constructed what is known as the McDonald-Deschamps ditch, which ditch taps Post Creek on its left bank in Section Ten (10), Township Nineteen (19) North, Range Nineteen (19) West, Montana Principal Meridian, for the purpose of diverting and conveying water from Post Creek to the lands of said person or persons unknown.

Admit that ever since 1935 the defendants, Beckwith Mercantile Company, John A. Hazel, Theodore Knutson, Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce and Bert Myers Nelson have diverted water from Post Creek through and by means of [106] said ditch for the irrigation of their lands.

Allege that the interveners do not have knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the names of the persons who dug said ditch or the date of the digging thereof, and whether or not the lands selected by the said persons were the lands thereafter allotted to them, or as to the size of said ditch and as to the length of time of the use thereof.

IX.

Admit that some person or persons unknown to interveners dug and constructed what is known as the Magee-Minesinger ditch, which ditch taps Post Creek on its left bank in Section Ten, Township Nineteen North, Range Nineteen West, M.P.M.,

for the purpose of diverting and conveying water from Post Creek to the lands of said person or persons unknown.

Admit that ever since 1935 the defendant, Thomas Wald, has diverted water from Post Creek through and by means of said ditch for the irrigation of his lands.

Allege that the interveners do not have knowledge or information sufficient to form a belief as to the truth of the allegations with respect to the names of the persons who dug said ditch or the date of the digging thereof, and whether or not the lands selected by the said persons were the lands thereafter allotted to them, or as to the size of said ditch and as to the length of time of the use thereof.

X.

Deny each and every allegation, matter and thing contained in Paragraph X of said third defense.

XI.

Admit that the Indians described in Paragraph XI of said third defense transferred their lands to the defendants named in [107] said paragraph. Allege that interveners have not sufficient knowledge or information to form a belief as to the truth of the allegations of said paragraph concerning the dates of said conveyances. Specifically deny that the said waters became appurtenant to said lands.

XII.

Deny each and every allegation, matter and thing contained in Paragraph XII of said third defense.

XIII.

Deny each and every allegation, matter and thing contained in Paragraph XIII of said third defense.

For reply to the fourth defense:

I.

Deny that the Secretary of the Interior committed error in not recognizing, determining or allocating water rights to the whole irrigable acreage of each Indian allotment in an amount as may be required to properly irrigate such lands.

For reply to the fifth defense:

I.

Intervenors reply to each and every paragraph contained in Paragraph I of said fifth defense in the same manner as said paragraphs are admitted, denied or qualified in the reply to the third defense.

II.

Allege that intervenors do not have sufficient knowledge or information to form a belief as to the truth of the allegations of Paragraph II of said fifth defense.

Wherefore, having fully replied to defendants' answer, interveners pray for the relief demanded in their complaint.

RUSSELL E. SMITH

Attorney for Intervenors.

[Endorsed]: Filed April 5, 1940. C. R. Garlow, Clerk, U. S. District Court, District of Montana.

[108]

Thereafter, on July 31, 1941, the Court's Findings of Fact, Conclusions of Law & Order were duly filed herein, in the words and figures following, to wit: [109]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 6, 1940, this cause came duly and regularly on for trial before the Court, sitting without a jury, at Missoula, Montana, on the issues joined by the Amended Complaint and the Amended Answer thereto and the Complaint in Intervention and the Answers thereto. The Plaintiff was represented by the Honorable John B. Tansil, Attorney of the United States for the District of Montana, and the Honorable Kenneth R. L. Simmons, District Counsel, Indian Service; the Defendants were represented by Mr. Lloyd I. Wallace, and the Intervenors by Mr. Russell E. Smith. The taking of testimony was begun, and not being concluded on

that day the further trial of the case was continued from day to day thereafter until May 8, 1940, at which time the taking of testimony was concluded, and the parties plaintiff, defendant and intervener asked for and were by the Court granted time to file briefs herein, and it was ordered that a transcript of the testimony taken and the proceedings had at the trial be furnished for the use of the Court. Briefs were filed by the respective parties plaintiff, defendant and intervener within the time allowed by the Court, the last thereof being filed on July 6, 1940, and transcript of the testimony taken and proceedings had at the trial of the case was furnished to the Court as [110] directed, and thereupon the cause was by the Court taken under advisement.

After due consideration and study the Court finds the facts to be as follows:

FINDINGS OF FACT

1: At the time the bill of complaint was filed herein on April 23, 1936, the defendants B. W. Alexander, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis, J. A. McKeever, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald were, and ever since have been, citizens of the United States of America and of the State of Montana residing within the confines of the

Flathead Indian Reservation in the State and District of Montana;

2: At the time the bill of complaint was filed herein, as aforesaid, the defendant Beckwith Mercantile Company was, and ever since then it has been, a corporation created, organized and existing under and by virtue of the laws of the State of Montana;

3: That by virtue of a treaty made and concluded at the Treaty Grounds at Hellgate in the Bitter Root Valley on July 16, 1855, and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and certain chiefs, head-men and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, it was understood and agreed that the said confederated tribes do hereby constitute a nation, with the name of the Flathead Nation, with Victor, the head chief of the Flathead tribe, as the head chief of said nation, and that the several chiefs, head-men and delegates whose names are signed to this treaty do hereby, in behalf of their respective tribes, recognize Victor as said head chief;

[111]

4: This treaty was ratified by the Senate of the United States on March 8, 1859, and the same was legally proclaimed by the President of the United States on April 18th that year;

5: Among ohter things, it is provided in said treaty, so made and concluded, ratified and proclaimed as aforesaid, as follows, to-wit:

Article 1. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them, within certain limits specifically described;

Article 2. There is, however, reserved from the lands above ceded for the use and occupation of the said confederated tribes and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may agree to be consolidated with the tribes party to this treaty, under the common designation of the Flathead Nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to-wit: (Here these lands are specifically described.) All of which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the confederated tribes and the superintendent and agent. And the said confederated tribes agree to remove to and settle upon the same within one year after the ratification of the treaty. * * *

Article 3. * * *

Article 4. In consideration of the above cession, the United States agrees to pay to said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty, the sum of one hundred [112] and twenty thousand dollars, in the following manner—that is to say: For the first year after the ratification hereof; thirty-six thousand dollars, to be expended under the direction of the President, in providing for their removal to the reservation, breaking up and fencing farms, building houses for them, and for such other objects as he may deem necessary. For the next four years, six thousand dollars each year; for the next five years, five thousand dollars each year; for the next five years, four thousand dollars each year; and for the next five years, three thousand dollars each year. All of which said sums of money shall be applied to the use and benefit of the Indians, under the direction of the President of the United States, who may from time to time determine, at his discretion, upon what beneficial objects to expend the same for them, and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of the Indians in relation thereto.

Article 5. The United States further agrees to establish at suitable points within said reservation, within one year after the ratification hereof, an agricultural and industrial school, * * *. To furnish one blacksmith shop, to which shall be attached a

tin and gun shop; one carpenter's shop; one wagon and ploughmaker's shop, and to keep the same in repair, and furnished with the necessary tools. To employ two farmers, one blacksmith, one tinner, one gunsmith, one carpenter, one wagon and plough maker, for the instruction of the Indians in trades, and to assist them in the same. * * *.

Article 6. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. [113]

* * * * *

Article 12. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

(12 Stat. 975.)

6: The Sixth Article of the Treaty with the Omahas provides as follows:

“The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof,

as provided for in article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one quarter section; to each family of three and not exceeding five, one half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one quarter section for every additional five members. And he may prescribe such rules and regulations as will insure to the family, in case of the death of the head thereof, the possession and enjoyment of such permanent home and the improvements thereon. And the President, may, at any time, in his discretion, after such person or family has made a location on the land assigned for a permanent home, issue a patent to such person or family for such assigned land, conditioned that the tract shall not be aliened or leased for a longer term than two years; and shall be exempt from levy, sale, or forfeiture, which conditions shall continue in force, until a State constitution, embracing such lands within its boundaries, shall have been formed, and the legislature of the State shall remove the restrictions. And if any such person or family shall at any time neglect or refuse to occupy and till a portion of the lands assigned and on which they have located, or shall rove from place to place, the President [114] may, if the patent shall have been issued, cancel the assignment, and may also

withhold from such person, or family, their proportion of the annuities or other moneys due them, until they shall have returned to such permanent home, and resumed the pursuits of industry; and in default of their return the tract may be declared abandoned, and thereafter assigned to some other person or family of such tribe, or disposed of as is provided for the disposition of the excess of said land. And the residue of the land hereby reserved, or of that which may be selected in lieu thereof, after all of the Indian persons or families shall have had assigned to them permanent homes, may be sold for their benefit under such laws, rules or regulations, as may hereafter be prescribed by the Congress or President of the United States. No State Legislature shall remove the restrictions herein provided for, without the consent of Congress."

7: Ever since April 8, 1859, the lands specifically described in Article 2 of the treaty made and concluded at the Treaty Grounds at Hellgate in the Bitter Root Valley July 16, 1855, as aforesaid, has been, and the same is now, an Indian Reservation subject to the right of the Flathead Nation, and at all times since April 8, 1859, said land has been, and it now is, occupied and inhabited by the Indians of said Flathead Nation;

8: By section 1 of the Act of February 8, 1887, 24 Stat. 388, 25 U.S.C.A. S 331 and note, it was provided: "That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, * * *

the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, * * * and to allot the lands in said reservation in severalty to any Indian located thereon in (specified) quantities." [115]

9: Section 5 of the Act, 25 U.S.C.A. S 348, provided:

"That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

10: Section 7 of the Act, 25 U.S.C.A., S 381, provided: "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may

deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

11: On April 23, 1904, an Act entitled "An act for the survey and allotment of lands now embraced within the Flathead Indian Reservation in the State of Montana and the sale and disposal of all surplus lands after allotment" was duly approved by the President of the United States; (33 Stat. 302-306);

12: This Act provides in part as follows:

"That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in [116] article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, Eighteen hundred and fifty-five.

"Sec. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said con-

federated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

“Sec. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, * * *.

“Sec. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. * * *.

“Sec. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the [117] smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

“Sec. 8. That when said commission shall have completed the classification and appraisement of all

of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. * * *. Provided, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six or the lands selected in lieu thereof, the sum on one dollar and twenty-five cents per acre.

“Sec. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: * * *: [118] Provided further, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, * * *.

* * * * *

“Sec. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily

incurred, and expenses of the survey of the lands, shall be expended or paid as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in Section Nine hereof, or expended on their account, as they may elect."

13: Section 19 of the Act of June 21, 1906, 34 Stat. pages 325 to 355, making appropriations for the Indian Department, amended the Act of April 23, 1904, by making additions thereto.

14: With specific reference to the Flathead Indian Reservation in Montana this Act provides:

That the Act of April 23, 1904, (33rd Statutes at Large, page 302), entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal [119] of all surplus lands after allotment" as amended by Section 9 of the Act of March 3, 1935, (33rd Statues

at Large, page 1048), be amended by adding the following sections:

* * * * *

“Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use, or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water.

34 Stat., pages 354-355.

15: The Act of May 29, 1908, (35 Stat. 444, 448), amended sections 9 and 14 of the Act of April 23, 1904.

16: Section 9 as amended provided in part: “The land irrigable under the systems herein provided, which has been allotted to the Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without costs to the Indians for construction of such irrigation systems;

17: The Act of May 29, 1908, Chapter 216, Page 444, 35 Statutes at Large, entitled “An Act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes” provided in part as follows:

“Sec. 15. That section 9, chapter 1495, Statutes of the United States of America, entitled “An Act

for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be and the same is hereby amended to read as follows: Sec. 9. That said lands shall be open to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when the manner in which these lands may [120] be settled upon, occupied and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy or enter any of said lands except as prescribed in such proclamation: * * *." (35 Stat. pages 448-449.)

"That lands irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for the construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charges for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear the pro-rata share of the cost of the operation and maintenance of the system under which they lie.

* * * * *

"The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary for the

purpose of carrying the provisions of this Act into full force and effect." (35 Stat. page 450.)

18: Section 14, as amended, provided that "the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and, after deducting the expense of the Commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred for expenses of the survey of the land, shall be expended or paid as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems for the irrigation of irrigable lands embraced within the limits of said reservation; one-half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior [121] as he may deem advisable for the benefit of said Indians in the purchase of livestock, farming implements, or the necessary articles to aid said Indians in farming and stock-raising and in the education and civilization of said Indians, and the remaining one-half of said money to be paid to said Indians and persons holding tribal relations on said reservation, * * *." (35 Stat. page 450.)

19: At the time of the ratification of said treaty of July 16, 1855, and ever since said time continuing to the present, the Jocko River, Dry Creek, Mission Creek, Post Creek, March Creek, Crow Creek and its branches, Mud Creek and its branches,

Lost Creek, Big Creek, and Hell Roaring Creek, were, have been, and are existing innavigable streams of water rising in the Mission Mountains in Montana and flowing through well defined channels with natural banks in the Mission Division of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana.

20: 'The Act of June 17, 1902, 32 Stat. 388, provides that all monies received from the sale and disposal of public lands in certain States, including Montana, beginning with the fiscal year ending June 30, 1901, shall be, and the same are hereby, reserved, set aside and appropriated as a special fund in the Treasury to be known as the "Reclamation Fund", to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion and development of waters for the reclamation of arid lands in said states and for the payment of all other expenditures provided in the Act, and directs that the Secretary of the Interior make examinations and surveys for and to locate and construct, as therein provided, irrigation works for the storage, diversion and development of waters (Sec. 2). That the Secretary of the Interior shall before giving the public notice provided for in Section 4 of this Act withdraw from public entries the lands required for [122] any irrigation works contemplated under the provisions of the Act and shall restore to public entry any lands so withdrawn when in his judgment

said lands are not required for the purposes of the Act (Sec. 3). That upon the determination by him that any irrigation project is practicable he may cause to be let contracts for the construction of the same in such portions or sections as it may be practicable to construct and complete as parts of the whole project, provided the necessary funds for such portions or sections are available in the Reclamation Fund, and thereupon he shall give public notice of the lands irrigable under such project and limit of acre per entry, which limit shall represent the acreage which in the opinion of the Secretary may be reasonably required for the support of the family on the lands in question; also of the charges which shall be made per acre upon the said entries and upon lands in private ownership which may be irrigated by the waters of said irrigation project (Sec. 4). That the entryman upon lands to be irrigated by such works shall in addition to compliance with the homestead law reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the government the charges appropriated against such tract, as provided in Section 4 (Sec. 5). To use the Reclamation Fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act (Sec. 6), and also that where in carrying out the provisions of the Act it becomes necessary to acquire any

rights or property the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation thereof under judicial process, and to pay from the Reclamation Fund the sums which may be needed for that purpose (Sec. 7). [123]

21: This Act also provides that nothing therein shall be construed as affecting or intended to affect or in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of waters used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior in carrying out the provisions of this Act shall proceed in conformity with such laws, and also provides that the right to the use of waters acquired under the provisions of the Act shall be appurtenant to the lands irrigated, and beneficial use shall be the basis, the measure and the limit of the right (Sec. 8). And in conclusion the Secretary of the Interior is authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of the Act into full force and effect (Sec. 10).

22: Section 1 of Chapter 44, Laws of Montana 1905, re-enacted as Section 4846 Revised Codes of Montana 1907 and Section 7099 Revised Codes of Montana 1921 and 1935, provides that the government of the United States may, by and through the Secretary of the Interior, or any person by him

duly authorized to act in that behalf, appropriate the waters of the streams or lakes within the State of Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals.

23: One H. N. Savage, Supervising Engineer, United States Reclamation Service, claiming to be thereunto duly authorized by the Secretary of the Interior of the United States in that behalf, under and pursuant to acts referred to in the last two findings, did pretend to make the following appropriations of the waters of Post Creek and its tributaries: [124]

Date of Appropriation	Amount of Appropriation	Date of Recordation in Office of County Clerk & Recorder, Missoula County, Montana	Vol. & Page Recorded in Book of Water Rights
Mar. 13, 1913	5,000 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J., P. 21
Mar. 31, 1913	500 cubic feet of water per sec- ond of time	April 7, 1913	Vol. J., p. 13
Apr. 5, 1912	500 cubic feet	April 7, 1913	Vol. J., p. 25
Mar. 29, 1913	of water per sec- ond of time		

(See Plaintiff's Exhibit 6);

24: The United States applied these waters to beneficial use within the time specified by the laws of the State of Montana, (Sec. 7099 R.C.M. 1935), and for the purposes as set out in the aforesaid

notices of appropriation pretended to be made by said H. N. Savage, and the United States has continuously used, and is now using, except as prevented by the defendants herein, all of the waters of Post Creek in its Flathead Irrigation Project system;

25: The lands on the Flathead Indian Reservation in Montana, and particularly the lands described in plaintiff's complaint herein and defendants' answer thereto, and in the complaint in intervention herein, and hereinafter specifically stated to have been allotted and patented to Indians of the Flathead Reservation in Montana, are, and at all times have been, arid in character and require, and at all times have required, irrigation in order that they produce crops to the full extent of the soil thereof;

26: On or about October 8, 1908, the United States issued to one Duncan McDonald, a Flathead Indian, Allottee No. 561, its trust patent for the East Half of the Northeast Quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on December 4, 1919, the United States executed and delivered to said Duncan McDonald a fee simple [125] patent for said land so allotted as aforesaid, (Defendants' Exhibit 23);

27: On or about October 8, 1908, the United States issued to one Florence McDonald, a Flathead

Indian, Allottee No. 560, its trust patent for the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and the Northwest Quarter of the South Quarter ($NW\frac{1}{4}$ of $S\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on November 5, 1917, the United States executed and delivered to said Florence McDonald a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 24);

28: On or about October 8, 1908, the United States issued to one Mary C. McDonald, a Flathead Indian, Allottee No. 559, its trust patent for the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on November 17, 1915, the United States executed and delivered to said Mary C. McDonald a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 25);

29: On or about October 8, 1908, the United States issued to one Frank Fiddler, a Flathead Indian, Allottee No. 785, its trust patent for the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on September 2, 1925, the United States executed and

delivered to said Frank Fiddler a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 26);

30: That in each of said fee simple patents so issued as aforesaid it is stated: "Now Know Ye That the United States of America in consideration of the premises has given and granted, and by these presents does give and [126] grant, unto the said claimant, and to the heirs of said claimant, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of said claimant forever."

31. On or about October 8, 1908, the United States issued to one William Deschamp, a Flathead Indian, Allottee No. 781, its trust deed for the Southwest Quarter of the Northwest Quarter of Section 16 (SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 16) and the Southeast Quarter of the Northeast Quarter of Section 17 (SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 17) in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land. Thereafter said William Deschamp died, and on August 16, 1920, the United States executed and delivered to Joseph Deschamp and Mary Rodgers Deschamp, heirs of said William Deschamp, a Flathead Indian, a fee simple patent for said lands, which, among other things, provides: "Now Know Ye that the United States of America in consideration of the

premises has given and granted, and by these presents does give and grant, unto the said heirs, and to their heirs, the lands above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said heirs and to their heirs and assigns forever." (Defendants' Exhibit 27);

32: On or about October 8, 1908, the United States issued to one Edward Deschamps, a Flathead Indian, Allottee No. 783, its trust patent for the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on November 9, 1910, the United States executed and delivered to said Edward Deschamps a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 28); [127]

33: On or about October 8, 1908, the United States issued to one Oro D. Freeman, a Flathead Indian, Allottee No. 784, its trust patent for the West Half of the Southeast Quarter ($W\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on March 8, 1917, the United States executed and delivered to said Oro D. Freeman a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 29);

34: On or about October 8, 1908, the United States issued to one John Minesinger, a Flathead Indian, Allottee No. 690, its trust patent for the South Half of the Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on December 4, 1919, the United States executed and delivered to said John Minesinger, a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 30);

35: On or about October 8, 1908, the United States issued to one James Waymack, a Flathead Indian, Allottee No. 689, its trust patent for the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on October 10, 1910, the United States executed and delivered to James Waymack a fee simple patent for said land so allotted as aforesaid, (Defendants' Exhibit 31);

36: On or about October 8, 1908, the United States issued to one Emma M. Magee, a Flathead Indian, Allottee No. 688, its trust patent for the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West of the Montana Meridian, Montana, containing 80 acres of agricultural land, and on August 25, 1916, the United States executed and delivered

to Emma M. Magee a fee simple patent for said land so allotted as aforesaid, (Defend- [128] ants' Exhibit 32) ;

37: Each of the patents referred to in Findings 32, 33, 34, 35 and 36 above contained the following words: "Now Know Ye that the United States in consideration of the premises has given and granted, and by these presents does give and grant unto the said claimant, and to the heirs of the said claimant, the land above described; to have and to hold the same, together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever ;

38: On August 22, 1934, the defendant Beckwith Mercantile Company subscribed, acknowledged and delivered to Clarence L. McVey and Lillian L. McVey, husband and wife, as joint tenants, the survivor to take the whole, its certain deed, in writing, wherein it granted, bargained, sold and conveyed unto them, and to their heirs and assigns forever, the real property situated in the County of Lake and State of Montana particularly described as the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, together with all water-rights, water, ditches and flumes connected

with or appurtenant thereto. The land covered by this deed is that conveyed to Florence McDonald by fee simple patent, as aforesaid, (Defendants' Exhibit 34); and at all times thereafter the grantees mentioned in said deed have been, and they are now, the owners in fee simple absolute of the land described therein;

39: At the time the complaint was filed herein—April 23, 1936—the defendant B. W. Alexander was the owner of and in possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the East Half of the Northeast Quarter ($E\frac{1}{2}$ of $NE\frac{1}{4}$) of Section 16, Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Duncan McDonald Allotment No. 561; [129]

40: At the time the complaint was filed herein as aforesaid the defendant Beckwith Mercantile Company, a Montana Corporation, was not the owner of or in the control or possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Florence McDonald Allotment No. 560, or any part or portion of the same; and at said time, and at all times since then, the defendant John A. Hazel was in control and

possession of said lands as tenant of Clarence L. McVey and Lillian L. McVey;

41: At the time the complaint was filed herein, as aforesaid, the defendants Theodore Knutson and Edna I. Knutson, his wife, were the owners of and in the control and possession of those certain lands lying within the Flathead Indian Reservation in Montana particularly described as the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) and the Northeast Quarter of the Southwest Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Mary C. McDonald Allotment No. 559;

42: At the time the complaint was filed herein, as aforesaid, the defendant P. W. Sorenson was the owner of and in the control and possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, formerly known as the Frank Fiddler Allotment No. 785;

43: At the time the complaint was filed herein, as aforesaid, the defendant Avery A. Stevens was the owner of and in the control and possession of the lands lying within the Flathead [130] Indian Reservation in Montana particularly described as the Southwest Quarter of the Northwest Quarter

(SW $\frac{1}{4}$ of NW $\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana, and the Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ of NE $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the William Deschamps Allotment No. 781;

44: At the time the complaint was filed herein the defendants Avery A. Stevens and Meil C. Pierce were the owners of and in the possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the East Half of the Southeast Quarter (E $\frac{1}{2}$ of SE $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Edward Deschamps Allotment No. 783;

45: At the time the complaint was filed herein the defendants Bert Lish, Bert Myers Nelson and John Ellis were the owners of and in the control and possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the West Half of the Southeast Quarter (W $\frac{1}{2}$ of SE $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Ora Deschamps Allotment No. 784;

46: At the time the complaint was filed herein, as aforesaid, the defendants John Minesinger and Ada B. Minesinger, his wife, were the owners of

and in the possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the South Half of the Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the John Minesinger Allotment No. 690; and it is stated in the complaint on file herein; "That pursuant to the afore- [131] said Acts of Congress of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 75.4 acres of the above described tract, * * *, to the extent of 2 acre feet of water per acre per annum, or a total of 150.8 acre feet per annum";

47: At the time the complaint was filed herein the defendant Thomas Wald was the owner of and in the possession and control of the lands lying within the Flathead Indian Reservation in Montana particularly described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the James Waymack Allotment No. 689, and the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West, Montana Meridian, Montana, formerly known as the Emma M. Magee Allotment No. 688; and it is stated in the complaint on file herein in connection with the James Waymack Allotment No. 689: "That pursuant to the aforesaid Acts of Congress of June

21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 52.3 acres of the above described tract, * * *, to the extent of 2 acre feet of water per acre per annum, or a total of 104.6 acre feet per annum"; and, in connection with the Emma M. Magee Allotment No. 688 it is stated in the complaint herein: "That pursuant to the aforesaid Acts of Congress of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 80 acres of the above described tract, * * *, to the extent of 2 acre feet of water per acre per annum, or a total of 160 acre feet per annum";

48: At the trial the plaintiff, the defendants, and the interveners, stipulated "that the defendants are the present owners of the lands involved in this action in equity" and that [132] the deeds by which they received the property contain the words "Together with any and all hereditaments and appurtenances". (Tr. p. 297)

49: On November 10, 1936, an order pro confesso was entered herein against the defendants Bert Myers Nelson, John Ellis, J. A. McKeever and Axel Erickson for failure to answer or further plead within the time allowed by the court on May 20, 1936;

50: At the time the complaint was filed herein, as it appears therefrom, (paragraph 17), the de-

fendant Axel Erickson was in control and possession of the lands lying within the Flathead Indian Reservation in Montana particularly described as the North Half of the Northwest Quarter ($N\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, and "that pursuant to the aforesaid Acts of Congress of June 21, 1906, and May 29, 1908, on November 25, 1921, the Secretary of the Interior granted a valid and subsisting water-right from Post Creek to 77.4 acres of the above described tract, known as the Julia Minesinger Allotment No. 691, to the extent of two (2) acre feet of water per acre per annum or a total of 154.8 acre feet per annum";

51: Purporting to act pursuant to the Acts of Congress of June 21, 1906, (34 Stat. 354), and May 29, 1908, (35 Stat. 448-450), the Secretary of the Interior appointed a committee to make findings of the water-rights on the Flathead Reservation in Montana. This committee made personal investigations on the ground and heard testimony and reviewed surveys made by engineers of the United States Reclamation Service of each tract of land on the Flathead Indian Reservation in Montana where irrigation had been used and early water-right developments made prior to the year 1909.

52: On December 10, 1919, this committee made its report to the Secretary of the Interior regarding early developments of water-rights on Post Creek and other streams [133] within the boundaries

of the Flathead Indian Reservation in Montana and made certain recommendations in accordance with instructions of the Secretary of the Interior. (Plaintiff's Exhibit 8)

53: The controlling principle observed in making the findings of the committee, as stated by it, was as follows:

In order that equity shall be done to all the various interests involved it is recommended that water-rights be determined under the following regulations:

Beneficial use prior to the appropriation by the United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch, and not exceeding for irrigation a limit of two acre feet per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land and no right to the use of water for irrigation can be acquired independent of its use upon and attached to different tracts of land and that water-right cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

54: This committee determined that Joseph McDonald and Joseph Deschamps, in 1906, constructed a ditch diverting water from Post Creek on the Flathead Indian Reservation in Montana, at a point on the left bank in the Southeast Quarter of the

Northwest Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 10, Township 19 North of Range 19 West, Montana Meridian, Montana, for the purpose of conveying water upon lands on the Flathead Indian Reservation in Montana, allotted and later patented to Indians of the Flathead Nation as follows:

Edward Deschamps, Allotment No. 783, North Half of the Southeast Quarter ($N\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West, Montana Meridian, Montana, and that ever [134] since that date there have been irrigated 9.5 acres in the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) and 0.8 acres in the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West; and said 10.3 acres were declared to have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 20.6 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

Oro Deschamps, Allotment No. 784; and that ever since said date there has been irrigated 4.8 acres in the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) and 9.3 acres in the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana, and that said 14.1 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre

per annum, or a total of 28.2 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

William Deschamps, Allotment No. 781; and that ever since said date there have been irrigated 9.6 acres in the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 16 and 1.5 acres in the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West, Montana Meridian, Montana, and that said 11.1 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 22.2 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

Frank Fiddler, Allotment No. 785; and that ever since said date there has been irrigated 0.9 acres in the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}$ of $SW\frac{1}{4}$) and 17.4 acres in the Southwest Quarter of the Southwest Quarter ($SW\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 [135] in Township 19 North of Range 19 West, Montana Meridian, Montana, and that said 18.3 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 36.6 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

Duncan McDonald, Allotment No. 566; and that ever since said date there has been irrigated 7.3

acres in the Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}$ of $NE\frac{1}{4}$) and 9.5 acres in the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 16.8 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 33.6 acre feet per annum; that none of the remaining area of said allotment has a water-right from any source;

Florence McDonald, Allotment No. 560; and that ever since said date there have been irrigated 6.3 acres in the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}$ of $NE\frac{1}{4}$) and 1.9 acres in the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 8.2 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 16.4 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

55: Referring to the Mary C. McDonald Allotment No. 559 this committee determined that in 1906 Joseph McDonald and William, Edward and Joseph Deschamps constructed a ditch diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that ever since that date there have been irrigated 0.8 acres in the South-

east Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) and 2.4 acres in the Northeast Quarter of the South- [136] west Quarter ($NE\frac{1}{4}$ of $SW\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 3.2 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 6.4 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

56: Referring to the Caroline McKeever allotment No. 791 this committee determined that Caroline McKeever in 1908 extended the McDonald-Deschamps ditch diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that at various times since said date there have been irrigated 1.3 acres in the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$) and 0.1 acres in the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 21 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 1.4 acres hereinbefore described have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 2.8 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

57: Referring to the Emma M. Magee allotment No. 688 this committee determined that A. D. Ma-

gee, the husband of the allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands for diverting water from Post Creek at a point on the left bank in the Southeast Quarter of the Northwest Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 10 in Township 19 North of Range 19 West, Montana Meridian, Montana, for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 40 acres in the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$) and 40 acres in the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West; that said 80 acres have a valid and subsisting [137] water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 160 acre feet per annum; and that none of the remaining area has a water-right from any source;

58: Referring to the John Minesinger allotment No. 690 this committee determined that George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at a point on the left bank in the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$ of the Northeast Quarter ($NE\frac{1}{4}$) of Section 10 in Township 19 North of Range 19 West, Montana Meridian, Montana, for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 38.7 acres in

the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) and 36.7 acres in the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 75.4 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 150.8 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

59: Referring to the Julia Minesinger Allotment No. 691 this committee determined that George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.1 acres in the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}$ of $NW\frac{1}{4}$) and 38.3 acres in the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 77.4 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 154.8 acre feet per annum; and that none of the remaining area of this allotment has a water-right from any source; [138]

60: Referring to the James Waymack allotment No. 689 this committee determined that A. G. Ma-

gee, the step-father of this allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands and diverting water from Post Creek at the point referred to in the last finding for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.3 acres in the Northwest Quarter of the Southwest Quarter (NW $\frac{1}{4}$ of SW $\frac{1}{4}$) and 13 acres in the Southwest Quarter of the Southwest Quarter (SW $\frac{1}{4}$ of SW $\frac{1}{4}$) of Section 17 in Township 19 North of Range 19 West, Montana Meridian, Montana; that said 52.3 acres have a valid and subsisting water-right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 104.6 acre feet per annum; and that none of the remaining area of said allotment has a water-right from any source;

61: In concluding its report the committee said:

“Filings are continually being made in Sanders, Missoula and Flathead counties claiming use to the rights of the water of the streams of the Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior, and settlers on ceded lands are subordinate in right to the needs and uses of the Indian allotments and farm units.”

62: The report of said committee and its recom-

mendations were approved by the Secretary of the Interior on November 25, 1921;

63: It appears from Plaintiff's Exhibit 10, and the Court finds, that:

73 acres of irrigable land on the Florence McDonald Allotment No. 560 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch; [139]

78.5 acres of irrigable land on the Edward Deschamps Allotment No. 783 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

74.5 acres of irrigable land on the Oro Deschamps Allotment No. 784 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

68 acres of irrigable land on the William Deschamps Allotment No. 781 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

48 acres of irrigable land on the Frank Fiddler Allotment No. 785 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

35 acres of irrigable land on the Duncan McDonald Allotment No. 561 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

70 acres of irrigable lands on the Mary C. McDonald Allotment No. 559 can be irrigated with

water carried from Post Creek through the McDonald-Deschamps ditch;

78 acres of irrigable land on the Caroline McKeever Allotment No. 791 can be irrigated with water carried from Post Creek through the McDonald-Deschamps ditch;

80 acres of irrigable land on the Emma M. Magee Allotment No. 688 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch;

78 acres of irrigable land on the John Minesinger Allotment No. 690 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch;

80 acres of irrigable land on the Julia Minesinger Allotment No. 691 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch; and,

79.6 acres of irrigable land on the James Waymack Allotment No. 689 can be irrigated with water carried from Post Creek through the Magee-Minesinger ditch; [140]

64: Two and one-half acre feet of water per acre per annum delivered on the land in the growing season is required to produce crops to the full extent of the soil on each of said irrigable acres on the Florence McDonald Allotment No. 560; on the Edward Allotment No. 783; on the Oro Deschamps Allotment No. 784; on the William Deschamps Allotment No. 781; on the Frank Fiddler Allotment No. 785; on the Duncan McDonald Allotment No.

561; on the Mary C. McDonald Allotment No. 559; and, on the Caroline McKeever Allotment No. 791;

65: Two acre feet of water per acre per annum delivered on the land in the growing season is required to produce crops to the full extent of the soil on each of said irrigable acres on the Emma M. Magee Allotment No. 688; on the John Minesinger Allotment No. 690; on the Julia Minesinger Allotment No. 691; and, on the James Waymack Allotment No. 689;

66. It is shown that during the months of June, July, August and September of the irrigation season in the year 1935 the defendants B. W. Alexander, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery Stevens, Meil C. Pierce, Bert Lish, Bert Myers Nelson and J. A. McKeever diverted from Post Creek, through the private ditch known as the McDonald-Deschamps ditch, and hereinbefore referred to, 1051.91 acre feet of water, and in the year 1936 1031.74 acre feet of water, in the year 1937 1253.94 acre feet of water, and, in the year 1938 1490.32 acre feet of water, for use, and actually used, in the necessary irrigation of their lands hereinbefore specifically described; but,

It is not shown that in doing so they, or either or any of them, acted wrongfully or unlawfully;

67: It is shown that during the months of June, July, August and September of the irrigation season in the year 1935 the defendants Axel Erickson,

John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald diverted from Post Creek, through the private ditch known as the Magee-Minesinger ditch, and hereinbefore referred to, 2180.9 acre feet of water, and in [141] the year 1936 2481.15 acre feet of water, in the year 1937 2156.02 acre feet of water, and, in the year 1938 2558.16 acre feet of water, for use, and actually used, in the necessary irrigation of their lands hereinbefore specifically described; but,

It is not shown that in doing so they, or either or any of them, acted wrongfully or unlawfully;

68: On July 12, 1935, Henry Gerharz as Project Engineer on the Flathead Irrigation Project on the Flathead Indian Reservation in the State of Montana addressed to the defendants Bert Nelson, Bert Lish, Avery Stevens, P. W. Sorenson, M. C. Pierce, B. W. Alexander, Lloyd McVey, Theodore Knutson and Mrs. Caroline McKeever as "Present owners of Deschamps-McDonald ditch" a communication in which they "are requested to have constructed by August 1, 1935, a suitable headgate at the point where your private ditch taps Post Creek and at some practicable place a proper measuring box, weir or other appliance for the measurement of the water flowing in your ditch which can be inspected and measurements made by you and the employees of this service, with the purpose of determining that no more of the water is diverted for the irrigation of your lands than allowed, as above set forth, by

the Secretary'', (Defendants' Exhibit 35); and said defendants, and each and all of them, have wholly failed and refused and continue to refuse to comply with said request, or any part of it;

69: In diverting and using said water so used for irrigating their lands, as aforesaid, the defendants have deprived the Flathead Irrigation Project of that amount of water which the project wished to use in its system for distribution to other lands lying under its canals, including lands not allotted to Indians of the Flathead Indian Reservation in Montana, and, that said water so diverted is, and at all times has been, necessary for the successful cultivation of lands not allotted to Indians of the Flathead Indian Reservation in Montana lying under the Flathead Irrigation Project system and the growing of crops thereon; [142]

70: It is not shown that the plaintiff has suffered great or irreparable or any injury, loss or damage by reason of the diversion by the defendants, or either of them, of water from Post Creek through said McDonald-Deschamps and said Magee-Minesinger ditches, or either of them, to defendants' said lands for use, and actually used, as aforesaid:

71: Prior to May 1, 1905, said McDonald-Deschamps ditch was dug and constructed from Post Creek, on the Flathead Indian Reservation in Montana, to the lands of Indian allottees:

Duncan McDonald, Allotment No. 561, described as the East Half of the Northeast Quarter (E1½ of

NE $\frac{1}{4}$) of Section 16, Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant B. W. Alexander, and upon which said defendant is, and at all times in the irrigating season of the year 1935, was using water from said ditch to properly irrigate said lands;

Florence McDonald, Allotment No. 560, described as the Southwest Quarter of the Northeast Quarter (SW $\frac{1}{4}$ of NE $\frac{1}{4}$) and the Northwest Quarter of the Southeast Quarter (NW $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 16, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by Clarence L. McVey and Lillian L. McVey as successors in interest of the defendant Beckwith Mercantile Company of St. Ignatius, Montana, a corporation, and upon which the defendant John A. Hazel is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

Mary C. McDonald, Allotment No. 559, described as the Southeast Quarter of the Northwest Quarter (SE $\frac{1}{4}$ of NW $\frac{1}{4}$) and the Northeast Quarter of the Southeast Quarter (NE $\frac{1}{4}$ of SE $\frac{1}{4}$) of Section 16 in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendants Theodore Knutson and Edna I. Knutson, his wife, and upon which said defendants are, and at all times in the irrigating season of the year 1935 were, using water from said ditch to properly irrigate said lands; [143]

Frank Fiddler, Allotment No. 785, described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 16, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant P. W. Sorensen, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

William Deschamps, Allotment No. 781, described as the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}$ of $NW\frac{1}{4}$) of Section 16, in Township 19 North of Range 19 West of the Montana Meridian, Montana, and the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}$ of $NE\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Avery A. Stevens, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

Edward Deschamps, Allotment No. 783, described as the North 30 acres of the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Avery A. Stevens, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

Edward Deschamps, Allotment No. 783, described as the South 10 acres of the Northeast Quarter of the Southeast Quarter of the Southeast Quarter ($NE\frac{1}{4}$ of $SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Meil C. Pierce, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands and other lands owned and cultivated by him in connection therewith; and,

Oro Deschamps, Allotment No. 784, described as the [144] Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}$ of $SE\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West of the Montana Meridian, Montana, now owned by the defendant Bert Lish, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands:

72: In the spring of the year 1907 said Magee-Minesinger ditch was dug and constructed from Post Creek to the lands of Indian allottees:

John Minesinger, Allotment No. 690, described as the South Half of the Northwest Quarter ($S\frac{1}{2}$ of $NW\frac{1}{4}$) of Section 17, Township 19 North of Range 19 West, Montana Meridian, Montana, now owned by the defendants John Minesinger and Ada B. Minesinger, his wife, and upon which said defendants are, and at all times in the irrigating reason

of the year 1935 were, using water from said ditch to properly irrigate said lands;

James Waymack, Allotment No. 689, described as the West Half of the Southwest Quarter ($W\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 17, in Township 19 North of Range 19 West, Montana Meridian, Montana, now owned by the defendant Thomas Wald, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands; and,

Emma Magee, Allotment No. 688, described as the East Half of the Southeast Quarter ($E\frac{1}{2}$ of $SE\frac{1}{4}$) of Section 18 in Township 19 North of Range 19 West, Montana Meridian, Montana, now owned by the defendant Thomas Wald, and upon which said defendant is, and at all times in the irrigating season of the year 1935 was, using water from said ditch to properly irrigate said lands;

73: On April 9, 1910, the United States of America issued and delivered a fee simple patent to Margarita Gariepy, an Indian of the Flathead Reservation in Montana, for those [145] certain lands particularly described as the East Half of the Southwest Quarter ($E\frac{1}{2}$ of $SW\frac{1}{4}$) of Section 26 in Township 20 North of Range 21 West of the Montana Meridian, Montana. This patent contained the following provision: "Now, Know Ye that the United States of America in consideration of the premises, has given and granted, and by these presents does give and grant unto the said Margarita Gariepy, and to her heirs, the lands above

described. To have and to hold the same together with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging unto the said Margarita Gariepy, her heirs and assigns forever." (Interveners' Exhibit No. 16);

74: At all times on and after December 10, 1936, the Intervener Dennis A. Dellwo has been, and he now is, the owner and in possession and control of said lands, and each and every part and portion of the same, as successor in interest of said Margarita Gariepy; (Interveners' Exhibit No. 16);

75: Said land is situated within the boundaries of the Flathead Indian Reservation in Montana and is included within the Flathead Irrigation District;

76: By an Order and Decree duly given, made and entered of record on August 26, 1936, in the District Court of the Fourth Judicial District of the State of Montana, in and for the Counties of Lake and Sanders, the Intervener Flathead Irrigation District, a corporation, was created and established as an irrigation district under the laws of the State of Montana, and particularly those laws providing for the creation of irrigation districts; (Secs. 7166, 7167 and 7168, R.C.M. 1921, as amended);

77: All the lands within the Flathead Irrigation District are lands within the Flathead Indian Reservation in Montana;

78: On May 12, 1928, in pursuance of the Act of [146] April 28, 1904, (33 Stat. 302), and Acts ammendatory thereto or supplemental thereto, and

particularly the Act of May 10, 1926, (44 Stat. 417, 464-466), and the Act of January 12, 1927, (44 Stat. 934, 945), the United States of America and the Flathead Irrigation District, a corporation, one of the interveners herein, entered into a certain repayment contract between said Flathead Irrigation District and the United States of America, which is in evidence here as Interveners' Exhibit No. 15);

79: Among the Acts amendatory of and supplemental to the Act of April 23, 1904, (33 Stat. 302), is the Act of May 29, 1908 (35 Stat. 444), which provides for the the building of irrigation systems in Indian reservations, including the Flathead Indian Reservation in Montana, and the opening for settlement and the settlement of lands upon the Flathead Indian Reservation in Montana after the allotment of lands to Indians of the Flathead Reservation had been completed (35 Stat. 448-449), and expressly provides as follows: "The land irrigable under the systems herein provided which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems."

80: Another of the Acts ammendatory of and supplemental to the Act of April 23, 1904, (33 Stat. 302), is the Act of June 21, 1906, (Stat. 325), which provides in part as follows:

"Section 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land

is granted by the Act, of the use of waters appropriated and used by them for the necessary irrigation of their land or for domestic use or of any ditches, dams, flumes or reservoirs constructed and used by them in the appropriation and use of said waters." (34 Stat. pp. 354-355);

81: On July 8, 1907, one Robert S. Stockton, an Engineer employed by the United States Reclamation Service, was ordered by H. N. Savage, Supervising Engineer, to proceed to the [147] Flathead Indian Reservation, Montana, and make a reconnaissance survey, to show what lands there would be irrigable, what waters were available, and what other natural resources were there which could be taken care of in the proposed opening of the Flathead Indian Reservation in Montana. Mr. Stockton arrived on the Flathead Indian Reservation in Montana on July 17, 1907, or shortly after. His duties were not to look into any irrigation that might be there but to see what land could be irrigated and what probability of power there might be, in order to make a general report which would be the basis of the construction of the project by the United States Reclamation Service.

Surveys were made by the plane table level and stadia work, maps were drawn, and a report was made on November 12, 1907. This report was put in evidence as Plaintiff's Exhibit No. 2.

Among other things this report shows, and the Court finds:

(1) That in general seventy-eight thousand acres of land on the Flathead Indian Reservation in Montana can be irrigated by gravity and fifty-seven thousand acres by pumping schemes;

(2) The reservation is about sixty miles long and thirty-five miles wide, and is divided *typographically* into the Mission Valley, the Jocko Valley and the Little Bitter Root Valley;

(3) The Mission Valley lies between Pend d'Oreille River and the Mission Range and extends from Flathead Lake to the Jocko Divide. This valley is about three thousand feet above sea level, has good soil and a climate suitable for small fruit, apples, grain and grasses. The most striking features of the country, and which influence the climate and conditions, are Flathead Lake and the Mission Range; [148]

(4) The Indians having tribal rights number 2356 and consist of Flatheads, Pend d'Oreilles, Kootenais and Spokanes. Many of these Indians are French-Canadian breeds, and some are whites who have married squaws or breeds, and these have some fine farms on the reservation;

(5) The soils of the Mission Valley vary from pure sand to sandy loam, with some white clay soil along the river, while along the range the soil is mixed with the black mold of the forest. The soils, while all would be classed as easily worked by the farmer, seemed to stand erosion well. Some of the ditches now constructed are on very heavy grades, yet do not wash out;

(6) Mission Creek, Post Creek and Crow Creek are the three main streams in the south end of the Mission Valley; they all head in the Mission Range and flow across the valley and ultimately into the Pend d'Oreille. The drainage area of these streams is not large but the flow is large and keeps up well on account of the high and forest covered mountains.

(7) The discharge of Mission Creek, Post Creek and Crow Creek, in acre feet, for the period commencing September 21, 1906, is as follows:

Mission Creek :

1906	September 21-30	1080
	October	3110
	November	2860
	December	2240
	Total acre feet.....	9290
1907	January	1320
	February	1070
	March	1530
	April	2400
	May	6400
	June	14000
	July	18000
	August	6580
	September	4210
	October	2040
	Total acre feet.....	57500
	Grand Total	66790

Post Creek :

1906	September 21-30	1130
	October	3410
	November	3900
	December	3090
Total acre feet.....		11530

1907	January	895
	February	
	March	2360
	April	2920
	May	6580
	June	15400
	July	15700
	August	5160
	September	3750
	October	2600
Total acre feet.....		55365

Grand Total66895

Crow Creek :

1906	September 21-30	444
	October	1840
	November	3060
	December	2100
Total Acre feet.....		7474

1907	January	1540
	February	922
	March	2640
	April	2810
	May	9470
	June	18300
	July	12400
	August	3900
	September	2530
	October	1630
Total acre feet.....		56142

Grand Total63616; and,

(8) The Mission Creek system covers 21,000 acres of irrigable land lying between Mission Creek on the South and Post Creek on the North. The Post Creek and Crow Creek system covers 33,000 acres net of the bench lands between Post Creek and Crow Creek. The water supply comes from Post Creek, regulated by a reservoir at Lake McDonald, and the canal lines surveyed are the "C" and "E" lines from Post Creek and the "F" line from Crow Creek.

The "C" line canal carries water from Post Creek, a short distance above the upper stage road, and carries water to the lower bench down near the Pend d'Oreille River. The net acreage is 12,000 acres. [150]

The "E" line out of Post Creek carries water across to Marsh Creek, and from thence on to the land at a high level. This system, together with extra water from Crow Creek, covers 15,000 acres.

The "F" line canal takes water from Crow Creek and has a capacity of 100 cubic feet of water per second.

A summary of the Mission Valley gravity systems as proposed is as follows:

Lands.	Gross Acres.	Net Acres.
Area under "A" Line, Mission Creek.	7,878	7,500
" " "B" " " "	10,975	10,000
" " "D" " " "	4,884	3,500
	<hr/> 23,737	<hr/> 20,000

Area under "C" Line, Post Creek,	15,908	12,000
" " "E" " " "	20,692	15,000
" " Crow Creek Lines,	7,888	6,000
	<hr/>	<hr/>
	44,498	33,000
Total Mission Valley Gravity Lines,	68,235	53,000;

With reference to the allotment of lands it is stated in this report:

A law was approved by Congress April 23, 1904, which provides for the allotment of the lands to the Indians having tribal rights, the survey of the reservation, and the appraisement of all the lands not allotted, except lands classed as mineral. * * *.

(Here were copied Sections 5 and 6 of the Act.)

Land is reserved for government purposes and for the Catholic societies, and where Sections 16 and 36 are allotted the State may take other lands, but the Indians must be paid for such lands at the rate of \$1.25 per acre. The lands not allotted or reserved shall be opened to settlement by a proclamation of the President under the general provisions of the homestead, mineral and townsite laws. That the price of said land shall be the appraised value thereof as fixed by the commission. * * * . Mineral entries can be made anywhere except on allotted lands [151] if the facts warrant such entry. Lands open to settlement under this Act and remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash under the rules and regulations of the Secretary of the

Interior, at not less than their appraised value, and in tracts not to exceed 640 acres to any one person.

82: The allotting of lands on the Flathead Indian Reservation in Montana was done by Col. John K. Rankin to 2356 Indians, or those claiming tribal rights as such, each person receiving 80 acres of farm land or 160 acres of grazing land. The Indians were allotted, as far as possible, according to the occupancy and preference of the Indians and cover most of the choicest lands of the Reservation;

83: All of the lands owned, controlled and occupied by the defendants in this action in equity, or either or any of them, were allotted as farm lands, and, at the time such allotments were made the lands allotted were occupied by an Indian of the Flathead Reservation in Montana, to whom the allotment was made, and an undetermined part of each of the allotments was then farmed by the Indian of the Flathead Reservation in Montana to whom such lands were allotted, and irrigated to an undetermined extent with waters conveyed from Post Creek on the Flathead Indian Reservation in Montana, through the McDonald-Deschamps Ditch or the Magee-Minesinger Ditch, to the land irrigated on such allotments;

84: The McDonald-Deschamps Ditch had, and has, a carrying capacity of 4.7 second feet of water;

85: The Magee-Minesinger Ditch had, and has, a carrying capacity of 3.1 second feet of water;

86: A second foot of water is that flow of water which will fill a cubic foot of space in one second

of time, which, flowing for 24 hours, makes 1.98 acre feet of water; [152]

87: The whole irrigable area of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana, as now constituted, is 138,000 acres;

88: The whole irrigable area of lands within said Project allotted to Indians of the Flathead Reservation in Montana in severalty is close to 70,000 acres;

89: The Flathead Irrigation Project system on the Flathead Indian Reservation in Montana, as constructed, consists of three quite definitely separated areas known as the Jocko, the Mission Valley, and, the Camas Divisions;

90: All of the lands owned, controlled or occupied by the Defendants in this action in equity and the Intervener D. A. Delwo, or either or any of them, are located in the Mission Valley District within said Project;

91: The Camas Division of said Project is fully 25 miles West of Polson; is across the Flathead River on the Flathead Indian Reservation in Montana from the lands owned, controlled or occupied by the Defendants in this action in equity and the Intervener D. A. Delwo, or either or any of them, and is not pertinent to the case at bar inasmuch as it has an entirely different source of water supply;

and it is not possible to intermingle the waters which are used on the Mission Valley Division and those which are used on the Camas Division of said Project system;

92: The Jocko Division consists of around 13,000 acres of irrigable land in the vicinity of Arlee on the Flathead Indian Reservation in Montana—that is South of the hills between Dry Creek and the Jocko River, and also a small area in the neighborhood of Dixon on the Flathead Indian Reservation in Montana of a few hundred acres;

93: This Division has a separate and distinct source of water supply from the main Mission Valley system of water [153] supply. The only connection that the Jocko Division has with the Mission Valley Division of said Project system is that flood or excess waters are taken from the middle fork of the Jocko River and carried by the Taber Feed Canal to Taber Reservoir and there stored, and may, if not needed in the Jocko Division, be used in the Mission Division of said Project system, if needed there;

94: While it is not impossible, it would be extremely difficult and not practicable to use any of the water from the Mission Valley Division on the Jocko Division of said Project system for the reason that the storages in general are lower;

95: The present irrigable area of land in the Mission Valley Division of the Flathead Irrigation Project system on the Flathead Indian Reservation

in Montana is 65,073 acres, of which the irrigated acreage on September 1, 1935, was 54,364 acres;

96: The amount of water available in acre feet per acre on the Mission Valley Division of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana, if only Indian allotments are considered, in the years 1935 to 1939, is as follows:

1935.....	2.34;
1936.....	2.38;
1937.....	1.78;
1938.....	2.118; and,
1939.....	2.112;

the average being.....2.16;

97: This Division is a more or less self-contained unit insofar as the irrigable lands and the water supply for those lands are concerned;

98: The amount of water available in acre feet per acre on the Mission Valley Division of the Flathead Irrigation Project system on the Flathead Indian Reservation in Montana is [154] not sufficient to produce crops to the full extent of the soil thereof if only Indian allotments located in that Division of said Project system are considered;

99: The irrigable area of the Indian allotments on the Flathead Indian Reservation in Montana is close to 70,000 acres;

100: The natural flow of water on the Flathead Indian Reservation in Montana is not sufficient to irrigate the irrigable area of all of the Indian allot-

ments on that Reservation to the extent necessary to produce crops to the full extent of the soil thereof, though there is sufficient water to raise good crops on all of the irrigable area of Indian allotments on the Flathead Indian Reservation in Montana if a large part of the water stored annually in the Flathead Irrigation Project system during the spring run-off and after the irrigating season is over in the fall is added to natural flow during the irrigating season on the Flathead Indian Reservation in Montana;

101: The total capacity of the storage reservoirs in the Mission Valley Division of the Flathead Irrigation Project system is about 98,000 acre feet;

102: The maximum storage ordinarily occurs above the first of July, and on July 1, 1939, 85,000 acre feet of water was in storage; and,

103: The "Amended Schedule of Lands in the Flathead Indian Reservation Subject to Entry September 1, 1910," ((Defendants' Exhibit No. 33), is addressed to persons holding numbers assigned to them under the proclamation of the President of the United States of America opening lands in the Flathead Indian Reservation in Montana to entry; described the lands which will be subject to selection by them on September 1, 1910; outlines the procedure to be followed by them in making their selections; and, contains the following warnings:

[155]

"The Government is now constructing irrigation

works from which the farm units will be irrigated as far as possible, but it cannot at this time be told what part or how much of any particular unit can be furnished with water. It is probable that water can be furnished to only a small portion of some of these units, and it is possible that there will be no water at all for some of them, nor can it be told now when the water will be ready for any of these units, as the development of the irrigation projects has not yet proceeded far enough to enable the giving of definite information on this subject at this time. All applicants must bear this fact in mind and make their selections accordingly, as they will act upon their own responsibility and without any guarantee from the Government, and the fact that water has not or cannot be furnished will not excuse any entryman from a full compliance with the requirements of the law as to residence, cultivation, and the payment of the Indian price. * * *."

CONCLUSIONS OF LAW

From the foregoing facts the Court draws the following legal conclusions:

1: The waters flowing on the Flathead Indian Reservation in Montana were impliedly reserved to the Indians by the Treaty of July 16, 1855;

2: The United States of America became a trustee holding the legal title to the land and waters on the Flathead Indian Reservation in Montana for the benefit of the Indians of that Reservation;

3: Being reserved no title to the waters on the Flathead Indian Reservation in Montana could be acquired by anyone except as specified by Congress;

4: The Act of May 29, 1908, Sec. 9, 35 Stat. 448-449, allocated to each parcel of irrigable land on the Flathead Indian Reservation in Montana allotted to an Indian in severalty a right to the use of such waters on the Flathead [156] Indian Reservation "as may be required to irrigate such land";

5: In the event that the supply of water on the Flathead Indian Reservation in Montana is insufficient to furnish that amount of water to all irrigable lands allotted to Indians on that Reservation in severalty the provisions of the general allotment act (Act of February 8, 1887, c. 119, Sec. 7, 24 Stat. 390; Sec. 381, Title 25, U. S. C. A.) requiring "just and equal distribution" of the water on said Reservation applies;

6: No right to the use of water on the Flathead Indian Reservation in Montana could be, or has been, acquired by the United States of America, or anyone else, by prior appropriation pursuant to local statute or custom;

7: Section 19 of the Act of June 21, 1906, 34 Stat. 325, 355, granted nothing, but is a saving clause;

8: When an allotment of irrigable land on the Flathead Indian Reservation in Montana was duly made to an Indian of that Reservation and it was

thereafter conveyed by him in fee the right to the use of such an amount of water "as may be required to irrigate such land", if the water available is sufficient to supply all others similarly situated, whether an Indian allottee or the successor in interest of an Indian allottee, with that amount of water for use on allotted irrigable lands in the Flathead Indian Reservation in Montana, passed to the owner of such land; and, in the event that the supply of water is insufficient to furnish that amount of water to the irrigable lands on the Flathead Indian Reservation in Montana allotted to Indians of that Reservation in severalty the Indian allottee, and his successor in interest, acquired and continues to have the right to a "just and equal distribution" of the waters on the Flathead Indian Reservation in Montana;

9: By Section 7 of the Act of February 8, 1887, C. 119, 34 Stat. 390; Sec. 381, Title 18, U. S. C. A., the Secretary of the Interior was authorized to prescribe rules and regulations to secure a just and equal distribution of the water on the [157] Flathead Indian Reservation in Montana among the Flathead Indians; but, he was not thereby, or by any Act of Congress, or otherwise or at all, authorized by rule, regulation or otherwise to deprive any allottee or the successor in interest of any allottee of irrigable lands in the Flathead Indian Reservation in Montana of the right to the use of such an amount of water "as may be required to irrigate

such land", or to a "just and equal distribution" of the waters on the Flathead Indian Reservation in Montana;

10: Adoption by the Secretary of the Interior of plans for irrigation projects to serve certain irrigable lands on the Flathead Indian Reservation in Montana was not enough to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty of July 16, 1855:

11. The contentions of the Plaintiff and the Interveners herein that prior to the Treaty of July 16, 1855, all rights in and to the waters of the streams on the Flathead Indian Reservation in Montana and their tributaries were the property of the Plaintiff; that all such rights were by said Treaty reserved to the Plaintiff and have never been relinquished; that no one else—Indian or White—has ever had the right to divert or use any of said waters without Plaintiff's consent; that no such right was conveyed to or acquired by any patentee of allotted lands in the Flathead Indian Reservation in Montana, or their successors in interest; and that, in diverting and using said waters for the irrigation of their lands the Defendants herein were trespassers, are unsupported by authority;

12: The waters flowing in the streams on the Flathead Indian Reservation in Montana and their tributaries were reserved by the Treaty of July 16,

1855, to the individual Indians of the Flathead Tribe and not to the Tribe, and under that Treaty [158] each member of the Flathead Tribe of Indians secured a vested right in the use of sufficient water to irrigate his irrigable lands in said Reservation to the full extent of the soil thereof, and such right had priority as of July 16, 1855; and

13: What right, if any, the Plaintiff, the Defendants and the Interveners herein, or either or any of them, may have to divert or use the waters of the streams flowing in the Flathead Indian Reservation in Montana and their tributaries cannot be determined in this action in equity. Such a determination would directly and materially affect all owners of land within the Reservation, many of whom are not parties to this action in equity.

It follows that it must be, and it is hereby, ordered:

That the complaint in this action be dismissed without prejudice; and,

That the complaint in intervention herein be dismissed without prejudice.

Judgment will be entered accordingly.

Done in open court at Butte, Montana, July 31, 1941.

JAMES H. BALDWIN,

United States District Judge
in and for the District of
Montana.

See:

Winters v. United States, 207 U. S. 564;
United States v. Powers, CCA 9th C., 94 Fed.
2nd 783;
United States v. Powers, et al., 305 U.S. 527;
United States v. McIntire, et al., CCA 9th
C., 101 Fed. 2nd. 650.

[Endorsed]: Filed July 31, 1941. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.
[159]

Thereafter, on August 29th, 1941, Judgment was
duly entered herein, in the words and figures fol-
lowing, to wit: [160]

[Title of District Court and Cause.]

JUDGMENT.

This cause came on regularly for trial before the
Court sitting without a jury on May 6, 1940 and
was concluded on May 8, 1940; the Honorable John
B. Tansil, Attorney of the United States for the
District of Montana, and the Honorable Kenneth
R. L. Simmons, District Counsel, Indian Service
appeared as Attorneys for the Plaintiff; Mr. Lloyd
I. Wallace appeared for the Defendants and Mr.
Russell E. Smith appeared for the Interveners; and
the Court having heard the testimony and having
examined the proofs offered by the respective parties
and the Court being fully advised in the premises

and having filed herein its Findings of Fact, Conclusions of Law and Order and having directed that judgment be entered in accordance therewith; now therefore, by reason of the law and the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed:

1. That the Complaint in this action be and the same is hereby dismissed without prejudice;

2. That the Complaint in Intervention herein be and the same is hereby dismissed without prejudice;

3. That the Defendants have judgment against the Interveners, Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, for their costs herein taxed in the sum of One Hundred Fifty-four & 70/100 Dollars (\$154.70).

Dated: August 28, 1941.

JAMES H. BALDWIN,

United States District Judge
in and for the District of
Montana.

[Endorsed]: Filed August 28, 1941. Entered August 29, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [161]

That on February 13th, 1942, Transcript of the Evidence and Proceedings at the trial of the cause was filed herein, in the words and figures following, to wit: [162]

[Title of District Court and Cause.]

Transcript of Testimony and Proceedings at the Trial at Missoula, Montana, on May 6, 7 and 8, 1940, before the Honorable James H. Baldwin, Judge.

Appearances:

For Plaintiff:

John B. Tansill,

U. S. District Attorney for Montana.

Kenneth R. L. Simmons,

District Counsel Indian Service.

For Defendants:

Mr. Lloyd I. Wallace.

For Interveners:

Mr. Russell Smith. [163]

[Title of District Court and Cause.]

TRANSCRIPT.

Be It Remembered: That the above entitled cause came regularly on for trial at Missoula, Montana, at ten o'clock a. m. on Monday, the sixth day of May, 1940, before the Honorable James H. Baldwin, Judge, sitting without a jury. Plaintiff was represented by John B. Tansill, United States District

Attorney for Montana, and Kenneth R. L. Simmons, District Counsel Indian Service. Defendants were represented by Mr. Lloyd I. Wallace of Polson, Montana; and the interveners were represented by Mr. Russell E. Smith, of Missoula, [168] Montana.

And thereupon the following proceedings were had and taken and the following evidence and none other was introduced:

The Court: Number 1529, United States of America against B. W. Alexander and others, Flathead Irrigation District and Dennis A. Dellwo, interveners, are the parties ready?

Mr. Tansill: We are ready, your Honor.

Mr. Smith: Come now, your Honor, the interveners, Dennis A. Dellwo and the Flathead Irrigation District, and ask leave pursuant to stipulation of counsel on file, to amend Paragraph I of the complaint by changing the description of the land in the same. I may say to the Court that at the time the bill in intervention was filed the land was correctly described but subsequent to the filing of the bill, and just recently, we discovered that this particular land described had been transferred out of the ownership of one of the interveners, and we ask that another tract of land at present owned, be substituted for that same tract. I may say the same issues arise.

The Court: And the answers to the original bill shall stand as answers to the amended bill?

Mr. Simmons: The answer of the government is, your Honor.

Mr. Wallace: And the answers of the defendants, your Honor.

The Court: Very well, let the record show that pursuant to stipulation of counsel for the respective parties the amendment is allowed; and let the record further show that the allowing of the amendment is upon condition, agreed to by all parties to the action, that the issues framed by the answers [169] to the original complaint shall be considered as framed by the answers now on file, with reference to the amended complaint.

Mr. Simmons: At this time, your Honor, the plaintiff asks leave of Court to amend the complaint in certain minor particulars. . . .

The Court: Very well, we will continue this case until October.

Mr. Simmons: Well of course this is very minor and there has been no objection raised by counsel for either the interveners or defendants.

The Court: If it is very minor why the need for it?

Mr. Simmons: We will withdraw the motion, your Honor.

Mr. Wallace: May it please the Court, there is a matter which seems to be missing in the answer of the defendants; I have discovered apparently an omission from the original answer filed to the original bill of complaint, and I would like to add a paragraph, pursuant to stipulation which all of the counsel representing the parties have signed, and the stipulation is on file, and with the permission of

the Court I would like to ask leave to amend the original answer by adding a new paragraph, pursuant to the stipulation secured, denying the allegations in the original bill of complaint that were not specifically denied in the original answer.

The Court: Well we find here a case that was begun on the 23 day of April, 1936, something over four years ago, and we have been dealing with that case at every term of court and out of term; the case has been set for trial for more than a month; the Judge presiding has come into court after having determined what the issues are as made by the pleadings now on file, which is essential to the proper trial [170] of the case. The parties come here now and pursuant to agreement by all parties, very probably change the deal; the Court has to back-track and again examine all the pleadings, to find out what has to be tried. You say these are minor matters, but if they are minor matters they are of no importance; on the other hand they may change the entire law controlling the action. However, I suppose we have to try cases, and I suppose we have to try them on a legitimate theory; still, I will grant leave to each of the parties to make the amendments of any kind to any pleading in the case, between now and two o'clock; the court will stand in recess until then.

And thereupon recess was had until 2:00 o'clock p. m. of said day, when the trial was resumed.

The Court: For the record—the contention of the defendants, Beckwith Mercantile Company, a

Montana corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorenson, Avery A. Stevens, Meil C. Pierce, Bert Myers Nelson, and Thomas Wald, that the complaint in intervention herein fails to state a claim against said defendants, as alleged in the first defense in their joint and several answers to the complaint in intervention herein, is overruled in its entirety.

Mr. Wallace: May it please the Court, the words "Admit, deny and" should not be in this answer, and I move that the words be stricken therefrom.

The Court: Very well; on motion of the attorney for the defendants Beckwith, Hazel, Knutson, Sorenson, Stevens, Pierce, Nelson and Thomas Wald, the words "Admit, [171] deny and," being the first three words in line 12 on page 6, under the designation "Third Defense," are stricken.

Well, have the parties agreed upon the amendments, and made them?

Mr. Simmons: If the Court please we have decided not to make any of the amendments contained in the stipulation, and stand on our complaint.

Mr. Smith: The interveners have no request for amendments other than as requested this morning.

The Court: Very well, proceed.

And thereupon an opening statement was made by Mr. Simmons on behalf of the plaintiff, followed by an opening statement by Mr. Wallace on behalf of the defendants, and thereafter an opening statement by Mr. Smith on behalf of the interveners.

The Court: Very well, call the first witness.
And thereupon the following evidence was introduced by the plaintiff on behalf of its case in chief:

ROBERT S. STOCKTON

was called as a witness in behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Will you state your name?

A. Robert S. Stockton.

Q. Where do you live at the present time, Mr. Stockton?

A. Near Thompson Falls, Montana.

Q. And what is your occupation? [172]

A. I am a retired engineer and live on a farm.

Q. Were you ever employed by the United States as an engineer?

A. Yes, I was employed by the United States Reclamation Service from 1903 to 1911.

The Court: Is it intended that I shall be furnished with a transcript of the testimony?

Mr. Simmons: Yes sir.

The Court: I can depend on that?

Mr. Simmons: Yes you certainly can, your Honor. I might say that we have adopted a policy of having all of our exhibits appear in the transcript, which we intend to do here, so that they will all be before you—there are numerous exhibits, and you will have them all in one book, so that you won't have to look for them.

(Testimony of Robert S. Stockton.)

The Court: Very well, but it is a little more convenient to have them separately.

Q. In your capacity, Mr. Stockton, as a government engineer, were you detailed at any time to the Flathead Reservation? A. Yes, in 1907.

Q. And what was the detail?

A. I was ordered by H. N. Savage, Supervising Engineer, to proceed to the Flathead Indian Reservation and make a reconnaissance survey, to show what lands there would be irrigable, what water power was available, and what other natural resources were there, which could be taken care of in the proposed opening of the reservation, which had been arranged between Mr. Savage and Senator Dixon.

Q. When did you arrive on the Flathead Reservation?

A. I arrived there either on July 17 or shortly after, [173] in 1907.

Q. And will you tell in a general way what you first did when you arrived there?

A. We shipped a car of surveying equipment, and two small parties were put in the field; the idea was to outline the areas of land which existed on the reservation that would be available for irrigation. My duties were not to look into any irrigation that might be there but to see what lands could be irrigated and what possibility of power there might be, in order to make a general report, which would be the basis of the construction of the proj-

(Testimony of Robert S. Stockton.)

ect by the United States Reclamation Service. Those two parties, the surveys were made by a plane table level and stadia work, the main bodies of land on the reservation, and the maps were drawn, and a report made which was dated November 12, 1907, and our work—most of the plane table work—was done around the falls of the Flathead River in connection with power development; the stadia work was in looking up reservoirs and in running the required lines across the open lands of the reservation. At that time the Indians were congregated along the streams and slopes along the edge of the timber at the foot of the mountains, where there was a little more water.

Q. Well now will you describe generally what you observed there at that time in regard to irrigation development?

A. Well at that time there seemed to be little use of water on the lands; they were wild lands; there were a few ditches on the Jocko Division, that had been built by the Indian Service, which were apparently used for wild growing and hay lands; there were a few gardens and fields around St. Ignatius apparently that were getting a little water, and there [174] was a ditch near the Pablo place, running across the road, apparently used for stock water. There was, as far as I could see, no real irrigation development. I mentioned in my report that no alfalfa was grown, or could be; the only farming of any magnitude that I noticed or that

(Testimony of Robert S. Stockton.)

I remember was the grain fields just south of Polson on the slope above the lake; there were wheat fields there, and 1907 was a wet year and there were very fair crops. Everything else on the reservation was apparently on a stock basis, and the Indians not doing any farming were doing a little stock raising and put up a little hay.

Q. Now Mr. Stockton, referring to this large map, marked plaintiff's offered exhibit 1, you will note on it a certain stream called Post Creek?

A. Yes, sir.

Q. Are you familiar with Post Creek, or were you familiar with Post Creek at the time you made this survey in 1907?

A. Yes I drove all over that country for two months, with a team, and directed these two parties, and was at that time familiar with Post Creek, Crow Creek and Mission Creek, and the other little creeks that run down from the mountains. There is a series of mountain ranges that runs north and south and the drainage lies to the west, and a very steep slope from the mountains down to the foot of the valley.

Q. Now in connection with your studies of the use of the waters of Post Creek, what recommendation, if any, did you make in your report that you prepared and sent to your superior officer?

A. Well we recommended that the irrigation system, proposed irrigation system, should be constructed to cover all the [175] lands that we had

(Testimony of Robert S. Stockton.)

outlined in our surveys, which were pretty much the lands colored on that map in white color, green and yellow; we run out trial lines which showed that those lines lie below the possible diversion of the various streams there, Post Creek, Crow Creek, Mission Creek and the Jocko River.

Q. Now Mr. Stockton have you been over the Flathead Irrigation Project in recent years?

A. I have been, and if I remember the different times, as far as I can remember, I was first there, after construction, in 1910, that date being fixed by the fact that I bought some land here near Missoula in 1910; and I visited the project in company with G. L. Davis, assistant engineer of the Reclamation Service. Then I visited the land—the project—again in 1918, when I was buying some more land down in this country.

Q. Now on those two trips to the project did you inspect the project work and inspect what is designated on that map as the Pablo Feeder Canal, on plaintiff's offered exhibit 1?

A. Yes—and I think it was the second time I was there—but anyway, one time I was there they had a small steam shovel at the north end of the Pablo Feeder Canal, which was working on that canal near the crossing of Mud Creek, and we drove over the project from St. Ignatius to this work on the canal.

Q. You understood the purpose of the Pablo Feeder Canal; could you briefly explain it?

(Testimony of Robert S. Stockton.)

A. The Pablo Feeder Canal was designed to make use of the fact that we had discovered that the slope of the country enabled a canal to be run almost north across the project or [176] the reservation lands, which would pick up all the water coming from the various small streams, Post Creek and Crow Creek and Mud Creek and so on, and that that was the most feasible way to establish an initial control of all the water and use it to the best advantage for the various lands that would be under it.

Q. You say to pick up all the water of the small streams; where do those streams arise?

A. In the Mission mountains.

Q. Now in your study of the use of the waters of Post Creek in 1907 what plan did you—what did you plan to do with those waters—how did you plan to use them—through what canal system did you plan to use them?

A. Well we laid out just a set of proposed canals and made an estimated supply to show that it was feasible to irrigate those lands and that they were under the water that was available, but that was only a mere reconnaissance on which the locating engineers could tie; they didn't use our lines at all, they didn't represent anything in connection with the construction work except that did show the feasibility of the construction works, and the lands that were outlined in our surveys are practically the lands that now exist under the constructed project;

(Testimony of Robert S. Stockton.)

and it was worked out largely in the territory between St. Ignatius and Polson, right in the big open area and on which at that time there was no fence, no fields, no anything else except the open prairie.

Q. You speak of a report which you submitted; how was this report submitted in 1907, when you made your investigation?

A. It was submitted to H. N. Savage, Supervising Engineer, [177] Northern Division, Reclamation Service.

Q. I hand you here plaintiff's offered exhibit 2, and will ask you to identify it?

A. Yes sir, I have examined this, and it is a correct photostat copy of the report which I made in 1907.

Q. It is a certified copy?

A. And this is a certified copy; I have read it through and I am sure that it is a proper copy.

Mr. Simmons: If the Court please I furnished the attorneys for the defendants copies of all of these exhibits; while I appreciate that I could go on at great length and examine Mr. Stockton as to the details of this offered exhibit, I think it would save the Court's time to introduce this as an exhibit, in evidence, and I now offer it as an exhibit in evidence, being a certified photostatic copy of the original report made to the Washington office by Mr. Stockton.

The Court: It will be admitted without objec-

(Testimony of Robert S. Stockton.)

tion; it will be considered read, and any party interested may at any time during the trial or the argument refer to and quote from this exhibit.

Plaintiff's Exhibit 2, being the document referred to, was thereupon received in evidence without objection, and is on file with and forms a part of the original exhibits in the case.

PLAINTIFF'S EXHIBIT 2

Exhibit No. 2 is a report of Robert S. Stockton, Project Engineer for the United States Reclamation Service, dated November 12, 1907, who in 1907 made a survey of the Flathead Indian Reservation for the purpose of determining the feasibility of irrigation and power development on the reservation. The report contains a general description of the soils, crops and climate of the reservation and opines that about 78,000 acres of the reservation could be irrigated by gravity and that about 57,000 acres by pumping. The report indicates that Mission Creek, Post Creek and Crow Creek are the three main streams in the south end of the Mission Valley, tables showing the discharge of these streams are shown. The report outlines in some detail a projected irrigation system for the reservation, including a dam at the falls of the Flathead river, a dam at Big Fork on the upper end of the Mission Valley Division, together with reservoir and canal systems which would distribute these waters. The report also shows a projected canal system for Mis-

(Testimony of Robert S. Stockton.)

sion Creek including the use of Lake St. Mary as a storage reservoir. The Post Creek and Crow Creek systems are likewise projected with three main canals being designated to carry the waters of Post Creek. This system includes a suggestion as to the possibility of using Lake McDonald as a storage reservoir. The report then covers the Jocko and Little Bitterroot divisions of the project. [549]

Mr. Smith: The interveners have no cross examination.

Cross Examination

By Mr. Wallace:

Q. Mr. Stockton, I believe you stated in your direction you had some instructions from Mr. Savage; were those instructions in writing? [178]

A. I had a letter officially instructing me to go on the reservation and make these surveys, dated July 8, 1907.

Q. I don't suppose you have those written instructions with you?

A. No, I haven't a copy of them here.

Q. And do you recall . . .

A. . . . That was just a formal letter of instructions; I had oral instructions, of course, as to just what I was to do.

Q. And you recall now, Mr. Stockton, there was nothing in those instructions about looking into

(Testimony of Robert S. Stockton.)

whatever private water right irrigation system may have been in existence at that time?

A. No, I wasn't instructed to look into any private water right irrigating system, all I was to do was to note that there was not much use of water in any private way.

Q. Well, while you were on the reservation in 1907 do you have any independent recollection now of these two ditches that are in dispute in this case, the Magee-Minesinger Ditch and the McDonald-Deschamps Ditch?

A. No, I don't think I could remember them; the only ditch I can remember that left the canal was the ditch that crossed the road near the Pablo place, and the ditches on the Jocko, I remember those.

Q. And so far as you remember those two ditches I just mentioned, may have been there?

A. They may have been there, yes, but I don't have any memory of them.

Q. And so far as you now know, or observed then, there may have been irrigation going on, in so far as pastures are [179] concerned?

A. Yes, most of the water that was developed was used for wild growing and pasture and small hay lands.

Q. And some wheat fields near Polson?

A. Yes, not irrigated land.

Q. I believe you stated you observed, when you went on the reservation, the Indians, generally speaking, were located pretty well along the streams where there was water running, and timber?

(Testimony of Robert S. Stockton.)

A. Yes.

Q. And settling there upon homesteads or something?

A. Yes.

Witness Excused.

GUY L. SPERRY

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Your name is Guy L. Sperry?

A. Yes sir.

Q. And your occupation?

A. Engineer with the United States Government on the Flathead Project.

Q. How long have you been connected with the United States as an employee?

A. I was employed first by the government in 1909 on the Flathead.

Q. And what was your position then? [180]

A. Surveyman; and I have been employed on the reservation more or less continuously since that date, in the capacities of surveyman, junior engineer, assistant engineer, and project engineer.

Q. You are now the Project Engineer of the Flathead Project?

A. Yes sir.

Q. Since what date have you been project engineer?

(Testimony of Guy L. Sperry.)

A. Since June 1938; and I might add that during that period I was out of the service four years on this project and was detailed to the San Carlos project in Arizona for about a year and a half on two separate occasions.

Q. Have you been in active charge of this construction, and would you say practically all of the project works on the project during those years?

A. No, I wouldn't say I had been actively in charge of construction during all of those years.

Q. But you actively participated in some capacity or other?

A. I participated in practically all the construction during those years.

Q. Referring to plaintiff's offered exhibit 1, I will ask you if you have seen that map before?

A. Yes sir.

Q. Did you have it prepared?

A. Yes, I had that map prepared.

Q. Will you advise as to the manner of preparation?

A. The manner of preparation was to take a series of maps—the maps were regular project maps made in the course of the regular work . . .

Q. . . . As part of the project records . . . [181]

A. . . . As part of the project records; and there were several of these maps, and these maps were photographed and enlarged to double the scale, by the United States Forest Service here in Missoula, and assembled in this form from the regular proj-

(Testimony of Guy L. Sperry.)

ect records, and colored, for the purpose of reference for this particular trial, but the maps themselves, or all of the essential physical features, were made regularly in the course of the project work.

Q. And that was all done under your direction?

A. Yes sir.

Q. I will ask you if the location of the towns, the railroads, the farms, the irrigation ditches, project works, the streams and the rivers on that map, the locations as shown on that map, are approximately correct, as the locations which you know them from your actual knowledge of the country?

A. Yes sir.

Q. And your trips over the country based upon your 28 years of work and in that particular locality?

A. Yes sir, those are accurate, as far as I am aware.

Q. Will you state what the color in green represents on the map?

A. The green color on the map represents in general the irrigable portion of the area in what we designate as the Mission Valley Division; and the yellow area represents the irrigable area of the Jocko Valley; the unshaded areas that are intervening between the green shaded portions are, in general, areas that are too high for irrigation, too rough, or for some reason or other are not physically appropriate for irrigation—some of them could be irrigated, but in general the lands are too high or too rough for irrigation. [182]

(Testimony of Guy L. Sperry.)

Q. What does the orange color represent?

A. The orange color along the river represents the power withdrawals that is withdrawn for power purposes.

Q. On the map you have designated by pen the Magee-Minesinger Ditch and the McDonald-Deschamps Ditch; are those the ditches referred to in plaintiff's complaint? A. Yes sir.

Q. And the map shows that these ditches—that the Magee-Minesinger Ditch, designated on Plaintiff's Exhibit 1, runs through certain lands designated in purple—I think that is purple . . .

A. . . . That's right, that is the Magee-Minesinger Ditch, is the ditch further north and west, and the McDonald-Deschamps Ditch is the east ditch, of the gross area of the land indicated in blue.

Q. Now will you describe the sources of water supply used on the lands described in green on the map—that is, as I understand it, the lands in the Mission Valley Division of the Flathead Project?

A. May I point to the . . .

Q. . . . If you will point and identify it so that we can . . .

A. . . . The area in green, of course the eastern boundary of the area in green is what is designated as our Pablo Feed Canal—if I might briefly just outline the gross area of the reservation, it will just take a minute or two to explain the . . .

The Court: Very well, proceed.

(Testimony of Guy L. Sperry.)

A. (continued) . . . of the reservation amounts to approximately a million and a quarter acres; this includes all of the lands of the Flathead Project, and of course a [183] considerable area that is outside of the project system. In general the boundaries of the reservation follow the Mission range of mountains on the east, the peaks of these mountains on the east, up to a point northerly, approximately in an east and west line at the middle of Flathead Lake. The northern boundary extends west across into the Lone Pine area, which is settled about 25 miles west of the Pablo Reservoir, and extends to the top of the mountain range between the Little Bitter Root River and the Little Thompson River, which is off of the map here. It follows in general, then, southerly along the peaks of the Cabinet mountains down to the Lo Lo, which would come down to this territory somewhere west of the Flathead Agency, and on further south, and this follows then the Lo Lo Forest mountain peaks here back to an area that is west of Arlee, and then southerly for a certain distance down approximately to Evaro, and then east again, continuing along the Lo Lo range of mountains designated as the Missoula range of the Missoula Forest, back to the area in here that is east of the Joeko lakes, and then north and connects up with your point of beginning, containing about a million and a quarter acres of land, in general. The Flathead Project, in particular, consists of three quite definitely sepa-

(Testimony of Guy L. Sperry.)

rated areas. One is the Jocko, consisting of around 13,000 acres of irrigable land in the vicinity of Arlee, that is, south of the hills between the Dry Creek and the Jocko River, and containing also a small area in the neighborhood of Dixon, of a few hundred acres.

Q. This area has a distinct and separate source of supply from the main Mission Valley system water supply? [184]

A. Has a separate and distinct source of supply from the main Mission Valley system of water supply; we mention it only to show that it is a separate and distinct one and when we refer to the Mission Valley we are not referring to this Jocko area. The only connection that the Jocko has with the Mission Valley is that surplus waters from the Jocko River are carried by what we call the Tabor Feed Canal from the middle fork of the Jocko to Tabor Reservoir and there stored; we even bring water from a point east of Jocko lakes about—the Jocko lakes are about five miles up from the point of diversion on the middle fork of the Jocko, and then these lakes extend about five miles east of that point and even beyond that point we have a canal which takes water out of Placid Creek bringing it across the divide and emptying into the Upper Jocko Lake and from where it flows into the Lower Jocko Lake and on down the Jocko River and then is diverted at the Tabor Feed Canal, as stated before, and into the Tabor Reservoir.

(Testimony of Guy L. Sperry.)

Q. Now do you use any of that water?

A. This water is used only—it is only the flood or excess waters from the Jocko River that are used in the Mission Valley.

Q. In other words your normal flow of water is taken from Jocko Lakes and then used on the Flat-head Division and not the Mission Valley Division?

A. Yes. I might explain it. In the spring of the year when these streams are during flood stage, all of the waters there is only a portion of the water that is needed in the Jocko Valley because they are not irrigating, in fact they are not irrigating there at the present time [185] except a very little—we are diverting the flood waters from these ditches into the Mission Valley.

Q. Now can you show in detail where the flood water is carried, or can be carried, at the point of distribution on the main project?

A. Well the flood waters from the middle fork of the Jocko, which has its source of supply in the Jocko Lakes, we divert in the Tabor Feed Canal and into the Tabor Reservoir, from where it drops down the Dry Creek lining, we call it, which is a concrete lined canal which was originally a creek, and then is diverted in this Pablo Feed Canal; in other words it comes down the lining and may be diverted north into the Pablo Feed Canal which is indicated upon this map by this line which is the junction between the green and white portions of this map, and this water may be diverted north as

(Testimony of Guy L. Sperry.)

far as Post Creek, run down Post Creek and diverted into Kicking Horse Reservoir. it may be carried on into Ninepipe Reservoir, if it is considered—if it is found desirable to store this water in these two reservoirs it might be stored there; it might be dropped down the Crow Creek here and stored in Lower Crow Creek Reservoir, if it is desirable; it can be continued on up into the Pablo Feed Canal and carried over and stored in the Pablo Reservoir; so that it is a very flexible system, so far as supplying waters from the Jocko Valley or from any of the streams along the Mission Range along whose base this Pablo Feed Canal runs.

Q. Now will you recite the other sources of supply of water supply, naming the streams, for the Mission Valley Division, and describe the uses made of them? [186]

A. The sources of supply for the Mission Valley Division are as indicated before, the Jocko water, flood water; the Dry Creek, which runs into the Tabor Reservoir, in addition to the waters that come in from the Jocko, the storage, and Mission Reservoir storage, and McDonald Reservoir—that is, the McDonald Reservoir is used in Post Creek—so we have the Dry Creek, Mission Creek, Post Creek, Marsh Creek, south, middle and south Crow Creek, and the branches of Mud Creek, Lost Creek, going north, and the canal that swings along west on the south side of the hill—this is what is ordinarily

(Testimony of Guy L. Sperry.)

designated the Polson Hill; this ridge is between the Pablo Reservoir and Polson and is designated as Polson Hill; it now swings along on south of that hill and continues in a westerly direction and then a southerly direction into the Pablo Reservoir. In addition to these streams there is a small amount of water that may be diverted from Big Creek up east of Polson, and Hell Roaring Creek which is farther north, by means of canal that we have here carrying the water from Hell Roaring to Big Creek, after the water goes through a power plant which belongs to the government, in this vicinity; after passing through the power plant it is diverted in a feed canal and is stored in twin reservoirs; one is available for use in this area, that is, in north of Polson here and east of Polson here. We have one more area which I simply describe . . .

Q. . . . Before you get to that, do you utilize any of the waters of Flathead River?

A. We utilize the waters of Flathead—we have two additional sources of supply, that is, we have water going from—any surplus water that may be—that may come into the creek— [187] into Crow Creek or Post Creek or Mud Creek below the Pablo Feeder Canal—any surplus water runs into Crow Reservoir, which is quite a bit lower in elevation than some of the other reservoirs indicated on the map. There are at times surplus waters by virtue of return flow from this large area in irrigation, there is more or less water collecting in the low spots and draws that

(Testimony of Guy L. Sperry.)

gets away from the irrigator, and by return flow goes into the various creeks adjacent to where the lands are being irrigated; these waters are collected and conserved in lower Crow Reservoir. In addition to its main purpose to turn water down from the Pablo Feeder Canal, there is also quite a water flow into Lower Crow Reservoir, and at times there is an excess of water in Crow Reservoir over the requirements of the Moise Valley, from which water runs down Crow Creek and is diverted in this Moise Canal; at times there is a surplus of water here and when this reservoir becomes full, this Crow Reservoir, we have a small pumping plant, indicated just west of the railroad, northwest of Ninepipe Reservoir, from which we pump; we have a 25 second foot pump, which would be 2000 miner's inches, which pumps water about 42 feet in elevation from which point it runs by gravity into Ninepipe Reservoir; we run this pump only when there is surplus water, more than will be needed for the Moise Valley; in other words we reclaim from eight to ten thousand acre feet of water each year by the Crow Creek pumping plant. I might call attention to the fact that before this canal from Tabor Reservoir down Dry Creek—before this creek was lined, we lost approximately 80 percent of that water before getting it down where it could be used; there are five or [188] six miles of this creek which is now lined with concrete lining and we can serve many thousand acre feet of waters that are made avail-

(Testimony of Guy L. Sperry.)

able and does not sink in the ground and get away from us, so we can use it down here where we cross the Pablo Feed Canal. In addition to the Crow Creek pumping plant we have just completed a pumping plant about four miles down the Flathead River from Polson; this is a 200 second foot plant, consisting of three pumps which lift the water about 335 feet in elevation through a 3—4 foot diameter pipe lines which are 630 feet long, and it is then carried from the end of the pipe lines through a concrete lined canal for about two miles and a quarter and by an earth canal from there for about another half mile into the Pablo Reservoir. This pumping plant has just been completed and will be in shape to deliver water—it is in shape to deliver water at the present time—in fact, we have already pumped 10 or 12 thousand acre feet of water into this Pablo Reservoir last fall and this spring. This pumping plant was made possible by the Kerr Dam, which is about three or four miles further down the river from the pumping plant, where the Montana Power Company has developed 77 thousand horse power by putting in a hydro-electric plant, and the project has an arrangement with the Power Company whereby they have secured a 15,000—that is, a block of 15,000 horse power for pumping and resale . . .

Q. . . . Now, referring in particular to the waters of Post Creek, will you explain how they are used

(Testimony of Guy L. Sperry.)

from their source; what control is exercised over them, by the government?

A. Well the waters of Post Creek are stored ordinarily in McDonald Reservoir; this McDonald Lake Reservoir was origi- [189] nally a natural lake, and an additional dam was placed across this by the government along about 1917; this lake has a capacity of somewhere between seven and eight thousand acre feet; the ordinary procedure is that water is allowed to collect in the lake until along in the spring some time, from Post Creek, which runs ordinarily somewhere around 40 thousand acre feet of water or 45 thousand acre feet of water a year; when the lake becomes full ordinarily the water is run from McDonald Lake down Post Creek to—or down Post Creek to the Pablo Feed Canal, and then is carried north to the point where the water is stored in the Pablo Reservoir. When your surplus of water is less—I might go back a little ways and say that this Pablo Feed Canal runs from south to north, as indicated by Mr. Stockton, for the reason that the larger supply of water in general is in the south end of the project; all these streams practically—Post Creek being the largest one of our streams—lie in the southern part of the valley, and for that reason this canal can be run from the point of the largest supply to the point of the lesser supply and provide an option on the location in which these waters can be used; if it were run from the lesser supply to the larger supply of

(Testimony of Guy L. Sperry.)

course you wouldn't be able to get your water in the location at which it is needed, that is, the point where there is less water supply, but the way the system is laid out that is possible, and the reason for the pumping plant of course is that this large capacity pumping plant is used because of the fact that there is not sufficient gravity water to water the irrigable lands without an additional supply by pumping. [190]

Q. What is the capacity of your storage reservoirs?

A. The total capacity of the storage reservoirs in the Mission Valley is just a little less than 100 thousand acre feet—about ninety-eight thousand acre feet.

Q. On an average how many acre feet do you impound annually?

A. We impound annually all the water that we can get from the various streams; the maximum storage ordinarily occurs about the first of July; in other words, early in the spring the flow is quite small; we impound all the water we can, that is, from the early flow; as the season advances in May we get considerable storage, and in June of course we get the large runoff, and ordinarily about July first we have our maximum storage in these various reservoirs, running up as high as 85 thousand acre feet last July first. I believe we had about 85 thousand acre feet in storage.

Q. Will you define this term we have used, that

(Testimony of Guy L. Sperry.)

is being used and that will be used constantly in this case—the “ultimate irrigable acreage” of your project?

A. The ultimate irrigable acreage of the project means the total eventual acreage that can be watered on the project by the project system; in other words it consists of all of the lands, or practically all of the lands, that are really susceptible of irrigation under the system, that we will have. The Pablo Feed Canal quite definitely fixes the elevation on the east side of the project; we do not expect to go above the Pablo Feed Canal except possibly in some exceptional cases.

Q. What is the ultimate irrigable acreage of the Flathead Project as it now consists?

A. About 138 thousand acres, including the Jocko Valley [191] and the Camas Division, which is about 25 miles west of the Pablo Reservoir and is not shown on this map and is not pertinent to the case in so far as its source of supply is defined.

Q. What is the ultimate irrigable acreage of the Mission Valley Division, designated in green on the map, Plaintiff's Exhibit 1?

A. About 112 thousand acres of the project lands and somewhere between five and six thousand acres of private—that is, the Secretarial rights or the rights that have been granted by the Secretary of the Interior.

Q. How many acres of your Mission Valley Di-

(Testimony of Guy L. Sperry.)

vision do you know were irrigated during 1935, actually irrigated under the government projects?

A. About 62 thousand acres—in 1935 I think, something less than that—I don't remember the exact acreage in 1935—I think it was 40 some thousand acres in 1935.

Q. Do you have any record here which would show how many acres were irrigated in 1935 by the government project system on the Mission Valley Division? A. Possibly I have.

Q. Would you refer to those records and refresh your memory?

A. The irrigated acreage September 1, 1935 was 54,364 acres.

Q. In the Mission Valley?

A. In the Mission Valley; that is the irrigated acreage, and the irrigable acreage, which took in all of the irrigable land, of the lands that were actually watered, was 65,073 acres. [192]

Q. Now that acreage, did that acreage include any acreage covered by these so-called Secretarial private water rights?

A. No, that was outside of the—in addition to the private Secretarial rights.

Q. Can you approximate the acreage covered by the Secretarial private water rights not under the Flathead Project in the Mission Valley Division?

A. Somewhere between five and six thousand acres.

(Testimony of Guy L. Sperry.)

Q. I show you plaintiff's offered exhibit 3 and will ask you to identify it?

A. This is a copy of the project—certified copy of the project map water rights, beneficial use, prepared by the engineers of the project, showing the location of the lands in this case, that is, the lands that are in litigation; showing the canals, private canals, and it is a copy of the—certified copy of the original map from which the larger map on this board has just now been made. I might say that this map is an enlarged copy of this map here, for the purpose of better illustrating and showing in detail the private ditches of the defendants and the only way in which the map differs are the working over some of the canals so as to make them stand out and show so that they will show what we are talking about, and that the lands indicated in the pink color are the lands for which private water rights were granted in the Secretarial decree or in the Secretarial adjudication, and that the lands in green represent the portion of the lands of the defendants which are under the Flathead Project system, under the government system. In other words there is a portion of most of the lands of the [193] defendants under the government system in addition to the lands for which they have private water rights.

Mr. Simmonds: We now offer the Plaintiff's Exhibit 3 in evidence as a certified photostat of an official map certified by . . .

(Testimony of Guy L. Sperry.)

The Court: Any objection?

Mr. Wallace: No objection.

Mr. Smith: No objection.

The Court: Admitted without objection.

PLAINTIFF'S EXHIBIT 3,

being the document so identified, was thereupon received in evidence without objection and is on file with the original exhibits in this case.

N



Former Allotment
No. 784
Ora Deschamps
Now owned by
Bert Lish.

SEC. 17, T. 19N. R. 19W. M.P.M.



Irrigated 4.8 Acres

June Creek

Brush
and
Swamp.

Irrigated 35.3 Acres

June Creek
MISSION LATERAL "B"

S $\frac{1}{4}$ Cor. Sec. 17

DEPARTMENT OF THE INTERIOR
U.S. INDIAN IRRIGATION SERVICE
FLATHEAD PROJECT MON.
WATER RIGHTS - BENEFICIAL USE
LANDS OF BERT LISH
FORMER ALLOTMENT No. 784
W $\frac{1}{2}$ SE $\frac{1}{4}$ SEC. 17, T. 19N. R. 19W.

F-4582

St. Ignace, Mont.
August 11, 1926.



24

19

20

21

0	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
1	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
2	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
3	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
4	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
5	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
6	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
7	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
8	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
9	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
10	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
11	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
12	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
13	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
14	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
15	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
16	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
17	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
18	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
19	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
20	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
21	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
22	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
23	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100
24	5	10	15	20	25	30	35	40	45	50	55	60	65	70	75	80	85	90	95	100

T19N R19W



LEGEND
 Corners found in place
 Property ownership
 Private canals
 Coulees
 Wire fence
 Pole fence

DEPARTMENT OF THE INTERIOR
 UNITED STATES RECLAMATION SERVICE
 FLATHEAD PROJECT MONTANA
WATER RIGHTS- BENEFICIAL USE
 AMENDATORY AND SUPPLEMENTAL PLAT
 SECTIONS 16, 17, 18, 20, 21 IN T19N R19W
 SCALE OF FEET
 0 1000
 APRIL 21, 1915

SUPERVISING ENGINEER
 PROJECT MANAGER

SHEET No 19
F-1402



MISCELLANEOUS IRRIGATION DATA FOR FISCAL YEAR 1935.

Sheet 3 of 4

Projects by State	Number of Indian Families Farming	Est'd. Total of Irrigable Land	Area under Constructed Canals	Acreage Irrigated by Indians	Acreage Irri- gated Ind. Land Leased	Acreage Irri- gated White Owned Land	Total Irrigated Year 1934	Acreage Under Constructed Canals not Irrigated	O & M Costs Fiscal Year 1935	Est'd Con- struction Expenditures Fiscal Year 1936	Tentative Estimates Additional Required to Complete	Estimated Cost Per Acre When Completed	Average value of Land Per Acre When Irrigated
COLORADO													
Pine River Project	80	15,522	5,700	3,856	341	1,431	5,628	72	13,890.20		3,510,000.00	78.00	125.00
Total.....	80	15,522	5,700	3,856	341	1,431	5,628	72	13,890.20		3,510,000.00	78.00	125.00
IDAHO													
Fort Hall	211	90,000	60,000	8,065	7,515	15,590	31,170	28,830	54,736.03	150,000.00	2,350,000.00	49.00	125.00
Fort Hall (Mise).....	115	10,000	5,000	3,382	300	80	3,762	1,238			250,000.00	25.00	100.00
Fort Lapwai Reservation.....	20	800	300	300			300						
Total.....	346	100,800	65,300	11,747	7,815	15,670	35,232	30,068	54,736.03	150,000.00	2,600,000.00		
MONTANA													
Blackfeet	11	80,500	21,565	O&M project discontinued Sept. 30, 1933				21,565			1,524,048.00	33.68	60.00
Crow	76	63,360	53,032	1,722	10,749	6,865	20,336	32,696	46,301.70		609,927.00	41.40	50.00
Fort Belknap	153	25,875	18,768	13,490	1,332	103	14,925	3,843	19,496.32		340,000.00	27.00	30.00 to 50.00
Flathead	68	136,541	101,417	1,873	3,762	54,580	60,215	41,202	104,885.84		2,540,000.00	52.00	70.00 to 95.00
Fort Peck	46	36,000	22,794	902	537	906	2,345	20,449	15,757.32		500,000.00		30.00 to 50.00
Total.....	354	342,276	217,576	18,987	16,380	62,454	97,821	119,755	186,441.18		5,513,975.00		
NEVADA													
Carson Sinks Allotments.....	60	4,877	4,877	1,600			1,600	3,277	5,418.71		32,500.00	52.00	125.00
Fort McDermitt	56	805	600	600			600				30,000.00	60.00	100.00
Hoopa	25	625	355	320			320	35			50,000.00	98.00	125.00
Pyramid Lake	60	3,130	2,200	862			862	1,338	2,282.12	50,000.00	20,000.00	20.00	150.00
Ruby Valley	5	40	10	5			5	5			3,000.00	75.00	125.00
Summit Lake	15	400	300	280			280	20			27,500.00	69.00	125.00
Walker River	64	7,088	3,512	1,780	40		1,820	1,692	6,772.63		15,000.00	82.00	100.00
Western Shoshone (Duck Valley).....	129	15,000	5,780	5,600			5,600	180		320,000.00	330,000.00	50.00	125.00
Total.....	414	31,965	17,634	11,047	40		11,087	6,547	14,473.46	370,000.00	508,000.00		

Projects by State	Number of Indian Families Farming	Est'd. Total of Irrigable Land	Area under Constructed Canals	Acreage Irrigated by Indians	Acreage Irrig- ated Ind. Land Leased	Acreage Irrig- ated White Owned Land	Total Irrigated Year 1934	Acreage Under Constructed Canals not Irrigated	O & M Costs Fiscal Year 1935	Est'd Con- struction Expenditures Fiscal Year 1936	Testative Estimates Additional Required to Complete	Estimated Cost Per Acre When Completed	Average value of Land Per Acre When Irrigated
NEW MEXICO													
Acoma	271	1,300	1,300	954			954	346		3,000.00	27,000.00	58.00	75.00
Capt. Tom Wash	41	2,500	1,500	280			280	1,220	500.00	25,000.00	50,000.00	56.00	75.00
Asamera	(1)	200	200					200			5,000.00	62.00	75.00
Mrs. H. Burke School		60	60			*60	60					200.00	125.00
Choiska	35	750	350	302			302	48			12,000.00	28.00	75.00
Cochita	65	1,824	821	468			468	353		3,000.00	72,000.00	62.50	125.00
Crystal	20	450	200	158			158	42	1,038.47		20,000.00	91.00	75.00
Logback	218	5,425	3,100	2,814		*265	3,079	21	10,551.94	25,000.00	179,000.00	145.00	125.00
Mleta	328	6,874	3,439	2,436			2,436	1,003			190,000.00	31.50	125.00
Sanchez	125	1,560	1,000	1,000			1,000	560	300.00		15,000.00	33.00	75.00
San Carlos Agency Project	100	485	440	282		158	440				13,000.00	44.00	100.00
San Juan Lake	(1)	400	400					400			12,000.00	50.00	75.00
San Juan (Fruitland)		5,100								40,000.00	302,000.00	162.00 (not complete)	125.00
San Juan	525	3,020	3,020	1,578			1,578	1,442	2,423.65	8,000.00	52,000.00	80.00	75.00
San Juan Lake	(1)	300	300					300			12,000.00	69.00	75.00
San Juan Agency Project	41	685	150	150			150				60,000.00	110.00	75.00
San Juan Rio Grande Conservancy									64.73				
San Juan	32	697	697	190			190	507	351.94	5,000.00	60,000.00	130.00	75.00
San Juan	(1)	300	300					300			10,000.00	55.50	75.00
San Juan	29	160	155	133			133	22		2,000.00	5,000.00	82.50	75.00
San Juan	24	700	700	143			143	557		3,000.00	30,000.00	92.00	75.00
San Juan	34	3,739	736	623			623	113			175,000.00	48.00	125.00
San Juan	120	3,797	1,451	1,030			1,030	421		5,000.00	155,000.00	43.00	125.00
San Juan	31	326	326	138			138	188			13,000.00	189.50	75.00
San Juan	140	867	867	647			647	220		2,500.00	21,500.00	100.00	75.00
San Juan	65	800	784	176			176	608			9,000.00	23.50	75.00
San Juan	56	1,180	625	582			582	43		5,000.00	30,000.00	31.60	125.00
San Juan	100	650	650	212			212	438		1,500.00	45,500.00	157.50	75.00
San Juan	175	4,030	1,752	1,177			1,177	575		8,000.00	182,000.00	51.00	125.00
San Juan	186	6,800	3,800	2,123			2,123	1,677	527.92	15,000.00	135,000.00	34.00	75.00
San Juan	30	320	225	221			221	4			17,000.00	165.00	75.00
San Juan	(1)	100	100					100			4,000.00	54.00	75.00
San Juan		250	250					250			7,500.00	62.50	50.00
Water Supply, Misc. Pueblos									8,284.98	3,800.00	539,300.00		
San Juan	32	1,000	758	229			229	529		19,000.00		49.00	75.00
San Juan	10		21	21			21						75.00
San Juan Agency Project	512									20,000.00	40,000.00	106.00	
San Juan		5,000	5,000	904	114		1,018	3,982					125.00
San Juan		1,375	638	199			199	439					75.00
San Juan		300	285	163			163	122					75.00
San Juan		1,485	486	288			288	258					75.00
Total	3,345	64,807	37,446	19,561	114	483	20,158	17,288	24,043.63	193,800.00	2,499,700.00		

STATEMENT OF IRRIGATION COSTS, FISCAL YEAR 1935, AND TOTALS TO JUNE 30, 1935, INDIAN IRRIGATION PROJECTS.

Sheet 4 of 6

	Costs for the Fiscal Year 1935				TOTAL COSTS TO JUNE 30, 1935.							Costs plus Inventories minus Repay- ments and Cancellations
	Preliminary Surveys and Construction	Operation and Maintenance	Admini- stration	Totals for the Year	Preliminary Surveys and Construction	Operation and Maintenance	Admini- stration	Value Inventories	Construction Repayments	Operation and Maintenance Repayments	Cancellations Act July 1, 1932	
IDAHO												
Bannock Creek-Fort Hall small projects	1,870.08		32.52	1,902.60	15,528.82	1,243.96	42.99	977.63			1,254.43	16,538.97
Four d'Alene					247.05						247.05	
Fort Hall		54,736.03	951.70	55,687.73	1,894,874.01	1,315,720.88	30,664.14	45,630.95	169,128.85	514,417.67		2,003,543.46
Fort Lapwai Reservation					3,361.63	310.60	47.93				2,509.95	1,210.21
Kootenai Allotments					100,979.49		605.76					101,585.25
Lehi					2,366.13						2,366.13	
Total	1,870.08	54,736.03	984.22	57,590.33	2,017,357.13	1,317,275.44	31,360.82	46,608.58	169,128.85	514,417.67	6,377.56	2,722,677.89
MINNESOTA												
White Earth Drainage					50.32		.45				50.77	
White Rice Lake					230.29						230.29	
Total					280.61		.45				281.06	
MONTANA												
Blackfeet					1,210,617.62	487,305.87	6,212.78	34,116.81	29,703.74	104,242.51		1,604,306.83
Brow		46,301.70	805.06	47,106.76	1,987,843.94	1,440,112.01	23,091.31	12,678.51	16,364.73	488,659.32		2,958,701.72
Flathead	283,231.62	104,885.84	6,748.27	394,865.73	7,175,559.94	1,492,211.05	62,629.25	68,992.88	91,386.37	987,708.69	149,853.85	7,570,444.21
Fort Belknap	1,205.80	19,496.32	359.95	21,062.07	366,001.71	371,210.14	5,831.08	6,821.39	40.10	11,815.24	231,476.54	506,532.44
Fort Peck		15,757.32	273.97	16,031.29	860,685.06	226,686.30	2,698.46	2,076.39	17,918.44	29,258.45	430,278.60	614,690.72
Tongue River	13,836.14		240.57	14,076.71	173,396.78	29,410.92	1,141.14	157.75			162,328.42	41,778.17
Total	298,273.56	186,441.18	8,427.82	493,142.56	11,774,105.05	4,046,936.29	101,604.02	124,843.73	155,413.38	1,621,684.21	973,937.41	13,296,454.09
NEBRASKA												
Kickapoo Drainage					421.51		.57				37.33	384.75
Total					421.51		.57				37.33	384.75
NEVADA												
Arrowhead Trail					60.54						60.54	
Ash Meadows					137.98		1.29				139.27	
Carson School					12,143.59	1.34	145.41				12,290.34	
Carson Sink Allotments	5,381.00	5,418.71	187.78	10,987.49	219,670.05	141,058.65	2,164.51					362,893.21
Fort McDermitt					6,278.95	1,735.54	92.52				8,107.01	
Moapa					11,128.04	5,795.10	208.69				17,131.83	
Pyramid Lake		2,282.12	39.68	2,321.80	131,384.45	68,515.20	1,760.54	276.35			199,614.74	2,321.80
Ruby Valley					761.25		5.85				767.10	
Summit Lake					259.44		2.70				262.14	
Walker River	81,654.34	6,772.63	1,537.50	89,964.47	281,615.43	116,710.56	5,310.68	18,366.00		232.90	261,117.23	160,652.54
Western Shoshone	9,666.64		168.07	9,834.71	89,063.15	48,815.00	2,008.70	15,449.54			112,578.99	42,697.40
Total	96,701.98	14,473.46	1,933.03	113,108.47	752,442.87	382,631.39	11,700.89	34,091.89		232.90	612,069.19	568,564.95

(Testimony of Guy L. Sperry.)

Q. Referring to the storage waters of the Flat-head Project, can you estimate what percentage of the waters are storage, which are used each year to irrigate the lands under the project system?

A. I can estimate the percentage without definite proof; it is not—that is not a figure that can be definitely stated and substantiated except as a matter of experience and knowledge. I will say that the best record that we have of the stored water is to take the amount of stored water on July first of each year; that is the date each year on which we find that our storage is at a maximum. We have at all times running water in from the various streams into the reservoirs of the project, and the inflow is a variable amount, and we are storing water at the same time that we are using water, drawing water out of the reservoirs for irrigation, and at times the in-go is in excess of the out-go, and along late in the season . . . [194]

The Court: Well, the question is can you do a certain thing; can you estimate the amount of water that is used in irrigation, from storage, during the runoff?

Mr. Simmons: Yes, can you estimate that amount?

The Witness: My estimate is about 38 percent of the water is stored water.

Q. Now, during the year 1935, during the irrigation season of 1935, without your storage water was there sufficient normal flow of water available

(Testimony of Guy L. Sperry.)

to adequately irrigate the lands irrigated under the Flathead Project system? A. No sir.

Q. Even with your storage water during 1935 was there sufficient water available to adequately irrigate the lands actually farmed and irrigated under your Flathead Project system?

A. No sir, there was not.

Q. Mr. Sperry, what do you mean by the duty of water?

A. Well, by the duty of water we would mean the amount of water that is required to irrigate an acre of land.

Q. And what would you say to be the average duty of water on lands under your Flathead Irrigation Project system—that is, in the project as a whole, between what figures would your duty run?

A. I would say to adequately irrigate the land it would run between a foot and three-quarters and three feet, possibly three and a half feet.

Q. Are you familiar with the lands of the defendants which are involved in this case?

Whereupon, at 3:27 o'clock p. m., recess was had for 15 minutes, at the expiration of which time the trial was [195] resumed, and the last preceding question was, by the reporter, read to the witness.

A. Yes, in a general way.

Q. What would you say as to the average duty of water on the lands of the defendants?

(Testimony of Guy L. Sperry.)

A. I think there is a difference in the duty of water, that is, of the nature of the lands under the two ditches; I would say that the lands under the McDonald-Deschamps ditch, which lies east of the Magee-Minesinger lands, are in general a little more open soil than the lower lands; in other words the lands that are higher along on the mountain range, in general are a little more open than the lands further down, they are a little more gravelly soil; the lands under the Magee-Minesinger ditch, I think, are fairly tight lands; under the McDonald-Deschamps they will require a little more water. I would say that possibly the Magee-Minesinger lands under this ditch, that a foot and three-quarters would be sufficient for very good crops; that the upper lands, the McDonald-Deschamps ditch, possibly might require two feet or some of them two and a half feet.

Q. When you say a foot of water you mean an acre foot of water?

A. An acre foot of water, yes.

Q. What do you mean by an acre foot of water?

A. It means sufficient water to cover an acre one foot deep.

Q. Mr. Sperry, referring to plaintiff's offered exhibit 4, I will ask you to designate by pointing out the colors of the lands of the defendants in this action, which are irrigable under the Flathead Irrigation Project system, and those which are cov-

(Testimony of Guy L. Sperry.)

ered by the so-called Secretarial private water [196] rights?

A. I believe that I indicated before that the lands of the defendants which have a so-called Secretarial right are those colored in pink; they are irregular shaped tracts, and the various lands of the defendants there are colored to make them stand out and for illustrating purposes they are colored pink. The lands colored green are the others or the remaining irrigable lands which are under the Flat-head Project.

Q. And subject, I take it, to water diversion from the Project system?

A. And subject to water diversion from the project system, and subject to operation and maintenance charges and construction charges the same as any other lands on the project.

Q. Now I am handing you plaintiff's offered exhibit number 5, and I will ask you to identify it?

A. This is a certified copy of reports submitted to the Congress of the United States on December 23, 1935.

Q. Does that report show the moneys the United States has expended for construction on the Flat-head Irrigation Project up to June 30, 1935?

A. Yes sir, it shows the total amount of costs to June 30, 1935, in two columns; one is Preliminary Surveys and Construction, which amounts to \$7,175,-559.94; and Administration, in another column, it

(Testimony of Guy L. Sperry.)

shows Administration Costs are \$62,629.25; these two columns together represent the total.

Q. And what is the total you get after adding those two columns together?

A. \$7,238,189.19.

Mr. Simmons: I ask leave, at this time, of recalling Mr. Sperry to prove certain other things in order. [197]

Cross Examination

By Mr. Smith:

Q. With reference to Plaintiff's Exhibit 1, as I understand, the Jocko Division of the Flathead Irrigation Project is shown in yellow?

A. That's right.

Q. And the Camas Division is not indicated on that map, is that correct?

A. The Camas Division is not indicated on the map for the reason that it is about 25 miles, the area served is fully 25 miles west of Polson, across the Flathead River, and could not be shown on this map, and is not pertinent to the case inasmuch as it has an entirely different source of water supply.

The Court: A motion to strike the last part—"not pertinent to the case because it has a different source of water supply"—would it be possible to intermingle the waters which are used on the Mission Valley Division and those which are used on the Camas Division?

The Witness: No.

Q. With respect to the Jocko Division is it pos-

(Testimony of Guy L. Sperry.)

sible to use any of the waters of the Jocko Division except the flood waters, as you have indicated, on the Mission Valley Division?

A. Well it is possible to use them but it is not the policy of the service to use them because they are natural waters that are tributary to this Jocko Valley, and up until these waters are now needed in the Jocko Valley they are diverted into the Mission Valley, but after the flood runoff is gone and there is not an excess of water for the Jocko Valley the policy of the department is to use these waters in the Jocko [198] Valley.

Q. Could the Mission be used on the Jocko Division?

A. No, I would say it would be extremely difficult, if possible, to use any of the waters from the Mission Valley on the Jocko, for the reason that the storages in general are lower; I wouldn't say it would be practical impossibility to use them, but extremely difficult and not practicable.

Q. Now then is the Mission Valley Division then a more or less self contained unit, in so far as the lands and the water supply for those lands are concerned?

A. Yes I would say that it is.

Q. You have indicated that the Pablo Feeder Canal runs from the south to the north?

A. Yes.

Q. And also that the greater source of supply of water on the reservation rises on the south end?

(Testimony of Guy L. Sperry.)

A. Yes sir.

Q. Of the reservation. That being true, if a great amount of water is taken out of Post Creek would that have a definite effect on the amount of water which could be used by some person owning land in the vicinity of Ronan, Montana?

A. Any water that is taken out of Post Creek above the Pablo Feed Canal, that is, any water that is diverted past the Pablo Feed Canal on Post Creek, puts it in a position where it deprives the land north, of that amount of water.

Q. Yes; with particular respect to the diversion through the Magee-Minesinger Ditch and the McDonald-Deschamps Ditch, does the amount of water which is taken through those two ditches influence to some extent the amount of water which [199] is available for lands lying to the north of those ditches?

A. It undoubtedly does.

Q. The McDonald-Deschamps and the Magee-Minesinger ditches take out above the Pablo Feeder Canal?

A. That's right.

Q. And those waters cross the Pablo Feeder Canal before they get to those defendants' lands?

A. Yes.

Q. I notice on the map a square marked in red, marked "Dennis A. Dellwo" or "D. A. Dellwo;" is that the land owned by the intervener D. A. Dellwo?

A. Yes.

Q. The map does not show, does it, in any color

(Testimony of Guy L. Sperry.)

designation, the area of the Flathead Irrigation District?

A. No. It shows the area, not by color; the boundary between the Flathead and the Mission irrigation districts is Post Creek; that is the separating line between the two irrigation districts.

Q. And is all of the land colored in green, north of the Post Creek lands, within the boundaries of the Flathead Irrigation District?

A. Yes it is.

Q. And the land to the south is in the Mission Irrigation District?

A. The land to the south is in the Mission Irrigation District, south and east.

Q. And in the operation of the project, insofar as the sources of supply are concerned and insofar as the deliveries of water to the lands are concerned, does the division of the project into these irrigation districts have any effect? [200]

A. Well it has an effect administratively, although all of the waters of the Mission Valley are handled as one source of supply and delivered to the lands without charge to the division, between the two irrigation districts.

Q. When you say administratively do you mean that in the sense of assessment of operation and maintenance costs and that sort of thing?

A. That's right.

Q. And not with respect to the actual use of the waters upon the lands in these two divisions?

(Testimony of Guy L. Sperry.)

A. That's right, there is no distinction in charge between the districts, in that respect.

Q. I believe you said that the average duty of water on the Mission Valley Division was from one and three-quarters and three and a half acre feet; do you mean that that is the average duty or that those are the minimum and maximum?

A. Those are the minimum and maximum. I would like to qualify the minimum and maximum, please; to state that there is a minimum and maximum would not be to state it correctly; there are some lands on the Flathead that raise very good crops with a foot and a half of water; there are possibly some lands on the project that might to advantage, small acreages, use in excess of, we will say three or three and a half feet, notably in the Moise Valley; that is the area that I would say is where most water would be required; and when I speak of a foot and three-quarters I mean for—or three to three and a half—I mean for good crops; that is what we might say would be an abundance of water, perhaps, not enough to waste, but sufficient water to raise good crops.

Q. Now then the one and three-quarter feet, that represents [201] properly a minimum, except for some few particular and rather exceptional tracts of land, is that it?

A. Well there is possibly a considerable acreage on the Post Division that——

(Testimony of Guy L. Sperry.)

The Court: No we can't deal with possibilities; we must deal with facts; we can't have a spread of one and a half to three and a half; you are dealing with the reasonable use of water on particular lands.

A. (continued) Well I would let it stand from one and three-quarters to three and a half.

Cross Examination

By Mr. Wallace:

Q. The ultimate irrigable area of the project was originally fixed at about 152 thousand acres, was it not?

A. Possibly; I would say that it has never been definitely fixed; it is impossible to fix the area definitely.

Q. And when you state there are between five and six thousand acres of lands irrigable with the so-called Secretarial water rights, you mean that is only the number of acres within the Mission Valley Division, or within the project?

A. Within the Mission Valley Division.

Q. Would you estimate the number of acres, other than irrigated by water recognized by the Secretary of the Interior, within the project?

A. About 84 thousand acres in the Mission Valley, in the classes of land that are accessible at the present time and irrigable.

Q. I'm afraid you didn't understand me. The number of acres of irrigable land without irrigation by water rights recognized by the Secretary of the

(Testimony of Guy L. Sperry.)

Interior within the pro- [202] ject, the whole project?

A. Approximately eight thousand acres.

Q. Now then I will ask you to approximate the irrigable area of the allotments, Indian allotments, within the project?

A. Those that were originally Indian allotments?

Q. Yes those that were originally Indian allotments? A. About 62 thousand acres.

Q. And does that figure of 62 thousand acres include the eight thousand acres that had the Secretarial recognized water rights or is that in addition?

A. I think that is in addition to the between five and six thousand acres in the Mission Valley.

Q. So that would be close to 70 thousand acres, then, of irrigable area of Indian allotments?

A. Yes.

Q. Have you any way of telling whether or not, with the amount of normal flow of water and the amount of storage water which you are now storing and which you contemplate storing when the project is completed, will be sufficient water to properly irrigate the whole irrigable area of the project as now constituted at 138 thousand acres, or will there be a shortage?

A. It is possible there may be shortages in the dry years. We have just completed our pumping plant and it is a little bit early, we haven't gone through a season, so it is a little bit early for us

(Testimony of Guy L. Sperry.)

to state just what effect this will have, although it increases our supply wonderfully.

Q. But you rather anticipate that there will still be a shortage, do you not?

A. I don't anticipate there will be a definite shortage [203] for the lands that will be desirous of receiving water because all the lands that are irrigable will never be under irrigation at one time.

Q. Let me ask you, if you know, is there not a movement on hand now, and an examination and survey being made by the government, with the end in view of eliminating some of the lands from the ultimate irrigable acreage of the project, for the purpose of being able to deliver a sufficient amount of water to the remaining lands, in a proper manner?

Mr. Simmons: Objected to as incompetent and having no bearing.

The Court: Overruled.

A. A survey is being made by the authorities of the Department to see what lands—whether the lands should be excluded—whether a supply is not sufficient for the entire irrigable acreage; as to what the survey may indicate it is too early to say.

Q. Mr. Sperry, in so far as you know, there is sufficient water available, normal flow of water, on the reservation, to irrigate the irrigable area of all of the Indian allotments, is there not, to the full extent?

A. Natural flow?

Q. Yes.

(Testimony of Guy L. Sperry.)

A. No there is—all of the original Indian allotments?

Q. Yes.

A. I would say that there is a sufficient to raise good crops for all of the original Indian allotments, if you include storage—not with natural flow.

Q. Well you wouldn't want to include all of the storage that is now available, would you? [204]

A. Pretty close to it—not all of it, possibly, but quite a little of it, but not all of the storage, possibly.

Q. Well there is about 62 thousand or 72 thousand acres of irrigable Indian allotments acreage, isn't there?

A. Something like that.

Q. Do I understand you to mean that it will take all of the normal flow of water and all of the available stored water to properly irrigate those Indian allotments to the full extent?

A. To irrigate all to the full extent it would take a large part of the storage.

Q. Well then if you propose to take all of the normal flow of water and all of the stored water that is available, and spread it out over 138 thousand acres, there will be a very serious shortage of water for all times to come, will there not?

A. There will be always need to be very careful of the water because there will never be an excess; we have, however, our two pumping plants, the Crow Creek pumping plant and the Flathead River pumping plant and our pumping plant on the

(Testimony of Guy L. Sperry.)

Pablo Reservoir, under which there are approximately 30 thousand acres of land, and these plants very materially relieve the demand for water in the future.

Q. I understand that but I am asking you if there will not be a serious shortage of water if all of this irrigable—ultimate irrigable area, of 138 thousand acres is put under irrigation?

A. If it were all irrigated at one time I would say yes; the history of all irrigated projects is that there is little more than 75 or 80 percent of the irrigable land being [205] watered any one year.

Q. And that is due to what?

A. Various things; some of the land is out of production, they don't seed it to additional crops, they don't water it in that particular year; some of the land becomes seepage; this 138 thousand acres, you understand, includes all the lands that are not at the present time being irrigated and that will not, until cleared up by drainage, be irrigated; so there is a considerable area to reduce this 138 thousand acres; there will never be 138 thousand acres irrigated at any one time; there will never be a demand for it.

Q. But that is in contemplation now isn't it?

A. That is in contemplation; we will reclaim, it is true, a part of it, but no doubt there will be other parts that will be swampy, and it will include the swampy area, so that will probably be out.

(Testimony of Guy L. Sperry.)

Q. Well the amount of area that will become scrapped will be negligible?

A. Well I wouldn't say it would be too negligible; there will be a considerable area that will be swamp.

Q. Will you estimate that for us?

A. Well it is difficult to estimate; I would say a good many thousand acres.

Q. Mr. Sperry, I may not have understood your testimony about the defendants' lands on Exhibit 4; you say the pink areas are those irrigated by the so-called Secretarial waters?

A. That's right.

Q. And the green is the balance of the irrigable area?

A. That's right. [206]

Q. The white is not irrigable?

A. The white lands are, for some reason or other, not irrigable; of course there are other lands that are not marked on there that are white, we made no attempt to designate.

Q. The Duncan McDonald piece, 561, is owned by B. W. Alexander in this case, and is above the Pablo Feeder Canal?

A. That's right.

Q. And cannot be irrigated from the Pablo Feeder Canal or from the project in any manner?

A. Not without additional ditches, no; it would be possible to take out, of course, above the defendants' ditches, and water the land up there.

Q. But you wouldn't be very apt to do that for one piece of land?

A. No.

(Testimony of Guy L. Sperry.)

Redirect Examination

By Mr. Simmons:

Q. Mr. Sperry would it be physically possible to run the Post Creek water in a southerly direction to irrigate those lands designated in green on plaintiff's offered exhibit 1?

A. It would be possible to run the waters from Post Creek and starting at the same point the Pablo Feed Canal crosses Post Creek, and irrigate practically all the land, although naturally if the canal were run in the opposite direction it would dump it so as to leave a certain area between the new location and the present location; however, it would be possible to divert higher up Post Creek and still cover all the lands that are in the system.

Q. Now in any year since 1935 has there been sufficient [207] water to adequately irrigate the lands actually irrigated and farmed under the Flat-head Project system in the Mission Valley Division?

A. No.

Mr. Smith: May I ask leave to recall this witness as a witness on my case in chief?

The Court: You may. Mr. Sperry, you said it would be possible to divert that water, but you testified heretofore, didn't you, that it would not be practicable?

The Witness: Yes.

The Court: Then why deal with possibilities when it isn't going to be practicable?

(Testimony of Guy L. Sperry.)

Mr. Simmons: Well I didn't understand him.

The Court: My understanding was it could be done, but to no purpose; is that your understanding?

The Witness: That's correct.

Witness Excused.

W. S. HANNA

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Your name is W. S. Hanna?

A. Yes sir.

Q. What position do you hold with the government?

A. District Engineer, United States Indian Irrigation Service.

Q. Does that give you supervision over the Flathead Irriga- [208] tion District? A. Yes.

Q. Since what year have you been connected with the—or have you been familiar with—the Flathead Irrigation District?

A. Well my first connection with the Flathead was in 1914; I was on a special commission that made a report on the Flathead at that time.

Q. And you went on the project and investigated the developments at that time?

(Testimony of W. S. Hanna.)

A. At that time yes.

Q. When did you have direct supervision of the Flathead irrigation? A. 1924.

Q. And how did that occur?

A. That was the time the handling of the Flathead work was turned over from the Reclamation Service to the Indian Irrigation Service.

Q. And you have had direct supervision of the project since 1924 to the present?

A. General supervision, yes.

Q. You are familiar with the sources of water supply on the project? A. Yes sir.

Q. Can you state approximately what percentage of the water is storage water, which is used for irrigation of the project lands in the Mission Valley Division?

A. Well I have made no special study of that; all I know is just what I heard, the project engineers estimate on it.

Q. It is considered, however, a storage project?

A. Yes. [209]

Q. Has there ever been a year, to your knowledge, when there has been an adequate water supply, from 1935 to the present, to adequately irrigate the lands actually irrigated in the Mission Valley Division, under the project system, including storage and normal flow of waters?

A. Well I doubt if there has been as much as they really require; it has run from an acre foot or a little less to one and a quarter or one and a half

(Testimony of W. S. Hanna.)

acre feet, minimum and maximum years.

Q. If more water had been available what would have been the result to the lands and the crops?

A. They would have used more water and probably raised a good deal more crops.

Q. Do you know of any lands that have been injured because of the shortage of water during 1935?

A. Not personally, but I have heard it mentioned on the project.

Q. Mr. Hanna I will hand you plaintiff's offered exhibit 6 and will ask you to identify it?

A. These are certified copies of notices of appropriation of water, that were made by the Reclamation Service in connection with the Mission Valley Division of the Flathead Project.

Q. Let me ask you this, in connection with the matter—did the Reclamation Service have charge or supervision of the Flathead Project at any time?

A. Yes.

Q. And do you know what years they had charge of the Flathead Project, its supervision and management?

A. From the organizing of the project, in 1907, to 1924. [210]

Q. And what is the date those filings were made?

A. Well here is one in 1913; I think some of them a little earlier than that.

Q. They were all prior to 1913 when the Reclamation had charge of the project?

(Testimony of W. S. Hanna.)

A. Well I can't say these were all made prior to that but it was along in there some time; some of them were made in 1910 or 1911, if I remember correctly, but they were made at the time the Reclamation was investigating and starting construction on the project.

Q. Do you know what the purpose of the Reclamation Service was, their officials, in making these filings?

A. Well it was my understanding it was simply notice to the public that that water was being appropriated for the Flathead private use.

Q. Did they attempt to acquire any rights thereunder? Do you know?

Mr. Wallace: Well it seems to me—we will object to that, as calling for a conclusion of the witness.

Mr. Simmons: I will withdraw it.

The Court: Very well.

Mr. Simmons: We now offer Plaintiff's Exhibit 6 in evidence.

Mr. Wallace: May it please the Court, the defendants recognize this is an equity case and there are equities in the case; we have no objection; in fact want the Court to have the benefit of all information possible in order to decide this case, but we do object to the introduction of this exhibit on the ground that it appears to be an attempt to appropriate water by the United States Government under [211] the state laws, state statutes of Mon-

(Testimony of W. S. Hanna.)

tana, and the Circuit Court has stated that the Montana statute is not applicable to acquiring a right to water.

Mr. Simmons: Of course it is not our contention at all that this establishes a water right; we plead under the complaint these notices of appropriation were filed merely as formal notice to all land owners on the reservation that the United States intends to make use of those waters. We are not relying on these appropriations in any way to establish any rights which may have accrued or vested in the Flathead treaty; it is simply a formal notice.

The Court: The objection will be overruled pro forma; the Court will determine finally whether or not the exhibits should be considered.

Mr. Smith: May the record show the intervener objects to the introduction of Plaintiff's Exhibit 6 in so far as the same constitutes an act on the part of the Bureau of Reclamation which is inconsistent with the ownership of water in the United States, on the ground that the commissioner of the Bureau of Reclamation had no power to do any act inconsistent with the right of the United States as holder of the legal title to the waters on the Flathead Reservation.

The Court: Well the same ruling. As I understand it counsel for the government says he does not intend to acquire any rights.

Mr. Simmons: No.

(Testimony of W. S. Hanna.)

The Court: And the offer is for the single purpose to show notice?

Mr. Simmons: That is the sole purpose. [212]

Plaintiff's Exhibit 6, the document referred to, was then received in evidence, and the same is on file with and forms a part of the original exhibits in this case.

PLAINTIFF'S EXHIBIT 6.

Approved by Director

Nov. 21, 1912

NOTICE OF APPROPRIATION OF WATER.

United States of America

State of Montana

County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled: "An Act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions", approved February 27, 1905, acting by and through H. N. Savage Supervising Engineer thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

1. That the said United States has a legal right to the use, possession and control of, and claims 5,000 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 60,000 acres of land, described as follows, to-wit:

17 to 22, 27 to 36-T. 20 N., R. 20 W.; 1 to 11, 13 to 16, 23 to 28, 31 to 36-T. 20 N.R. 21W.; 1 to 30,-T. 19 N., R. 20W.; 1, 2, 11 to 14, 23 to 25-T. 19 N., R. 21W.; 1 to 36-T. 21 N., R. 20W.; 1, 2, 11, 12-T. 20 N., R. 22W.; 23 to 26-T. 22 N., R. 21W.; 29 to 36-T. 22 N., R. 20W. also for domestice use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits [470] to be constructed in connection therewith.

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which it is intended to divert said waters is as follows:

A storage dam and controlling works for storing water and dropping same by natural channel, to canals taking out of streams at points below the dam.

which will carry and conduct.....cubic feet of

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

water per second of time from said Post Creek which said

will divert the water from said stream at a point upon its right bank, which bears N. 62° 00' W (mag) dist 856' from the southern M.C. to fractional M. C. marked M. C. on N side, Secs. 10 & 11, T. 19 N. R. 19 W.

and run thence

thence over and upon said lands.

4. That the said United States appropriated said water on the 31 day of March, A. D., 1913, and on that day caused a notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated, among other things:

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: The date on which the said notice was posted.

E. The name of the appropriator as herein set forth.

5. That the name of the appropriator of the said water is the United States of America. [471]

6. That the said United States also hereby claims said ditch and the right of way therefor and for

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

said water by it conveyed, or to be conveyed, from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed or to be constructed by the said United States in appropriating and using said water.

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA,

By: (sgd) H. N. SAVAGE,

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn deposes and says that he is a citizen of the United

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

States and over the age of twenty-one years; that on the 31 day of March, A. D., 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN. [472]

Subscribed and sworn to before me this 1st day of April, 1913. My commission expires: Dec. 24, 1915.

(Seal) (sgd) M. A. O'CONNELL,
Notary Public in and for the State of Montana,
residing at St. Ignatius, Montana.

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 31, 1913, he was and is now an employee of the United States, being Supervising Engineer in charge of the work of the United States in the State of Montana, under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the foregoing notice, and that the matters and facts contained therein are true.

That he caused said notice to be posted on behalf of the United States at the place named therein:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

and that said notice was so posted as he verily believes.

(sgd) H. N. SAVAGE.

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

(Seal) (sgd) R. J. REYNOLDS,

Notary Public in and for the State of Montana, residing at Great Falls, Montana. [473]

Approved by Director
Nov. 21, 1912.

NOTICE OF APPROPRIATION OF WATER.

United States of America
State of Montana
County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled: "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions", approved February 27, 1905, acting by and through H. N. Savage Supervising Engineer

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

1. That the said United States has a legal right to the use, possession and control of, and claims 500 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 8,000 acres of land, described as follows, to-wit:

Sec. 13 to 14; 22 to 24; 27 to 30, and 32 and 33, T. 19 N., R. 20 W. Sec. 25 and 26, T. 19 N., R. 21 W. also for domestic use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits to be constructed in connection therewith. [474]

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which it is intended to divert said waters is as follows: Diversion dam and canal 14 feet wide and 5 feet deep which will carry and conduct 200 cubic feet of water per second of time from said Post Creek which said diversion dam and canal will divert the water from said stream to a point upon its right bank, which bears N 37° 45' W (mag) distant 158' from SE corner

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

Sec. 12, T. 19 N., R. 20 W. and run thence south-westerly thence over and upon said lands.

4. That the said United States appropriated said water on the 31 day of March, A. D., 1913, and on that day caused a notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated, among other things:

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: the date on which the said notice was posted;

E. The name of the appropriator as herein set forth.

5. That the name of the appropriator of the said water is the United States of America.

6. That the said United States also hereby claims said ditch and the right of way therefor and for said water by it conveyed, or to be conveyed, from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed [475] or to be constructed by the said United States in appropriating and using said water.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunto belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA,

By: (sgd) H. N. SAVAGE,

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 31st day of March, A.D., 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN.

Subscribed and sworn to before me this first day of April, 1913.

My commission expires.....

(sgd) M. A. O'CONNELL,

Notary Public in and for the State of Montana,
residing at

[476]

(Seal)

Notary Public for the State of Montana residing at
St. Ignatius.

My Commission Expires December 24, 1915.

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 31, 1913, he was and is now an employee of the United States, being Supervising Engineer in charge of the work of the United States in the State of Montana under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the foregoing notice, and that the matters and facts contained therein are true.

That he caused said notice to be posted on behalf of the United States at the place named therein,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

and that said notice was so posted as he verily believes.

(sgd) H. N. SAVAGE.

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

(Seal) (sgd) R. J. REYNOLDS,
Notary Public in and for the State of Montana, residing at Great Falls, Montana. [477]

Approved by Director Nov. 21, 1912.

Notice of Appropriation for use where part of the water claimed has been perviously diverted.

NOTICE OF APPROPRIATION OF WATER.

United States of America

State of Montana

County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana, entitled: "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions," approved February 27, 1905,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

acting by and through H. N. Savage Supervising Engineer thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

1. That the said United States has a legal right to the use, possession and control of, and claims 500 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 30,000 acres of land, described as follows, to-wit:

Sections 28 to 36, T. 20 N., R. 20 W.

Sections 1 to 22, T. 19 N., R. 20 W.

Sections 23 to 26, 34 to 36, T. 20 N., R. 21 W.

Sections 1 to 3, 9 to 15, 22 to 27 & 36, T. 19 N., R. 21 W.

also for domestic use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits to be constructed in connection therewith. [478]

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which said waters have been diverted is as follows: Log crib Diversion Dam, headworks and canal 18 ft. wide and 7 ft. deep, which carries and will conduct 400 cubic feet

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

of water per second of time from said Post Creek, which said Log Crib Diversion Dam, Headworks and Canal diverts the water from said stream at a point upon its North bank, which bears N. 46° 58' W (Magnetic) distant 989' from NE corner of NW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 5, T. 19 N., R. 19 W., and runs thence Westerly, thence over and upon said lands.

4. That the United States appropriated by diverting and putting to beneficial use said water on the 9 day of May, 1912, and on March 29, 1913 caused a notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated among other things:

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: the date on which the said water was diverted;

E. The name of the appropriator as herein set forth.

5. That the name of the appropriator of the said water is the United States of America.

6. That the said United States also hereby claims said ditch and the right of way therefor and for said water by it conveyed, or to be conveyed,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed or to be constructed by the said United States in appropriating and using said water. [479]

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunder belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA,

By: (sgd) H. N. SAVAGE,

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

1-29-13

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn, deposes and says that he is a citizen of the United

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

States and over the age of twenty-one years; that on the 29th day of March, A. D. 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN.

Subscribed and sworn to before me this First day of April, 1913.

My commission expires.....

(Seal) (sgd) M. A. O'CONNELL,

Notary Public in and for the State of Montana,
residing at

Notary Public for the State of Montana residing at
St. Ignatius.

My commission expires December 24, 1915. [480]

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 29, 1913, he was and is now an employee of the United States, being Supervising Engineer in charge of the work of the United States in the state of Montana, under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the fore-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

going notice, and that the matters and facts contained therein are true;

That he caused said notice to be posted on behalf of the United States at the place named therein, and that said notice was so posted as he verily believes.

(Sgd) H. N. SAVAGE.

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

(Seal) (sgd) R. J. REYNOLDS,

Notary Public in and for the State of Montana, residing at Great Falls, Mont. [481]

Approved by Director Nov. 21, 1912.

Notice of Appropriation for use where part of the water claimed has been previously diverted.

NOTICE OF APPROPRIATION OF WATER.

United States of America,
State of Montana
County of Missoula—ss.

To All Whom These Presents May Concern: Be it known that the United States of America, pursuant to the provisions of the act of June 17, 1902 (32 Stat., 388), and under and by virtue of an act of the Legislative Assembly of the State of Montana,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

entitled: "An act authorizing the Government of the United States to appropriate the water of the streams in the State of Montana, subject to certain restrictions," approved February 27, 1905, acting by and through H. N. Savage, Supervising Engineer thereunto duly authorized by the Secretary of the Interior of the said United States in that behalf, does hereby publish and declare as a legal notice to all the world as follows, to-wit:

1. That the said United States has a legal right to the use, possession and control of, and claims 500 cubic feet per second of time of the waters of Post Creek.

2. That the purposes for which said water is claimed are for irrigating, domestic use and power purposes, and the place of intended use is to irrigate and use said water upon 50,000 acres of land, described as follows, to-wit:

Sections 5 to 8, 17 to 20, 29 to 32, T 21 N, R 19 W.

Sections 4 to 9, 16 to 21, 28 to 33, T 20 N, R 19 W.

Sections 28 to 33, T 22 N, R 19 W.

Sections 1 to 36, T 21 N, R 20 W.

Sections 1 to 36, T 20 N, R 20 W.

Sections 13 to 36, T 21 N, R 21 W.

also for domestic use in connection with the said land, and for developing power for pumping and other purposes at the point of diversion, and along the irrigating ditches and water conduits to be constructed in connection therewith. [482]

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

3. That the means of diversion, with size of flume, ditch, pipe or aqueduct by which said waters have been diverted is as follows: Log Crib Diversion Dam, headworks and canal, 15 ft. wide and 6 ft. deep which carries and will conduct 200 cubic feet of water per second of time from said Post Creek which said Log Crib Diversion Dam, Headworks and Canal diverts the water from said stream at a point upon its North bank, which bears S 78° 15' W (Magnetic) dist. 902' from the E $\frac{1}{4}$ corner sec. 4, T 19 N, R 19 W and runs thence Northerly, thence over and upon said lands.

4. That the United States appropriated by diverting and putting to beneficial use said water on the 5 day of April, 1912, and on March 29, 1913 caused notice of appropriation to be posted in a conspicuous place at the point of diversion hereinbefore described, which said notice stated among other things.

A. Number of cubic feet of water per second claimed as herein set forth;

B. The purpose for which the water was claimed and the place of intended use, as hereinbefore described;

C. The means of diversion, as herein set forth;

D. The date of appropriation, to-wit: the date on which the said water was diverted;

E. The name of the appropriator as herein set forth.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

5. That the name of the appropriator of the said water is the United States of America.

6. That the said United States also hereby claims said ditch and the right of way therefor and for said water by it conveyed or to be conveyed, from said point of diversion and appropriation to said lands or point of final discharge, and also the right of location upon any lands of any dams, flumes, and reservoirs constructed or to be constructed by the said United States in appropriating and using said water. [483]

7. That the said United States also claims the right to keep in repair and to enlarge said means of water appropriation at any time and to change the point of diversion and the right to dispose of said right, water, ditch or said appurtenances in part or whole, at any time.

Claiming the same all and singular under any and all laws, national and state, and in accordance with the rulings and decisions thereunder in the matter of water rights.

Together with all and singular the hereditaments and appurtenances thereunder belonging and appertaining, or to accrue to the same.

UNITED STATES OF AMERICA

By: H. N. SAVAGE

Its agent in that behalf and thereunto duly authorized by the Secretary of the Interior of the said United States.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

State of Montana

County of Missoula—ss.

E. W. Tappan, having been first duly sworn deposes and says that he is a citizen of the United States and over the age of twenty-one years; that on the 29th day of March, A. D., 1913, in the course of his employment by the United States he posted the above notice at the place named therein at the point described as the point of diversion, and that the matters and facts contained in said notice are true.

(sgd) E. W. TAPPAN

Subscribed and sworn to before me this First day of April, 1913.

My commission expires.....

[Seal] (sgd) M. A. O'CONNELL

Notary Public in and for the State of Montana, residing at.....

Notary Public for the State of Montana, Residing at St. Ignatius.

My commission expires December 24, 1915. [484]

State of Montana

County of Cascade—ss.

H. N. Savage, having been first duly sworn, deposes and says that he is a citizen of the United States over the age of twenty-one years; that on March 29th, 1913, he was and is now an employee

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 6 continued)

of the United States, being Supervising Engineer in charge of the work of the United States in the State of Montana, under the act of June 17, 1902 (32 Stat., 388); that he knows the contents of the foregoing notice, and that the matters and facts contained therein are true;.

That he caused said notice to be posted on behalf of the United States at the place named therein, and that said notice was so posted as he verily believes.

(sgd) H. N. SAVAGE

Subscribed and sworn to before me this 4th day of April, 1913.

My commission expires May 24th, 1913.

[Seal] (sgd) R. J. REYNOLDS

Notary Public in and for the State of Montana, residing at Great Falls, Mont. [485]

Q. I hand you Plaintiff's offered exhibit 7 and will ask you to identify it?

The Court: Another water right?

Mr. Simmons: No, this is a letter of instructions, to the private water rights committee.

A. This is a certified copy of a letter to the Superintendent of the Flathead Reservation from the Second Assistant Commissioner of Indian Affairs, giving certain instructions as to the formation

(Testimony of W. S. Hama.)

of a committee and the actions of a committee in determining the private water rights.

Mr. Simmons: A letter setting up personal instructions in regard to the committee which was appointed.

The Court: Submit it to counsel.

Mr. Simmons: I have submitted copies to both counsel.

The Court: Very well, any objection.

Mr. Smith: No objection.

Mr. Wallace: No objection so far as the defendants are concerned.

The Court: In evidence without objection.

Plaintiff's Exhibit 7, the document referred to, was thereupon received in evidence without objection and the same is on file with and forms a part of the original exhibits in this case.

PLAINTIFF'S EXHIBIT 7

Department of the Interior

Office of Indian Affairs

Washington

June 27, 1912.

Mr. Fred C. Morgan,
Superintendent Flathead School.

Sir:

The Office is in receipt of a letter from Edward Clairmont, dated February 14, 1912, transmitting copies of notices of appropriation of water in Mis-

(Testimony of W. S. Hanna.)

soula County, Montana, in which he represents that the ditches were constructed out of private funds, and that he should be confirmed and protected in his water rights.

Your letter of February 14, 1912, reporting the inclination of the Indians to continue the use of private and old government ditches in preference to taking water from the new system being constructed by the Reclamation Service, taken in connection with Mr. Clairmont's letter, would seem to indicate that if all those who have farms irrigable by ditches built with private funds are protected in their water rights and not charged for construction of the new project, their objections to the new project might be overcome. With this end in view, the matter was referred to the Secretary of the Interior with recommendation that a committee, which shall include the Superintendent of the reservation, the Engineer engaged in the work, and an Indian to be selected by the Indians, be appointed to make an examination for the purpose of determining the lands so affected, and that all lands so irrigated should be determined to have a paid-up water right under the new system.

The Secretary approved the first recommendation, that an examination be made by a committee so constituted, which should report its findings with recommendations as to whether, and to what [487] extent, the old ditches should be taken into consideration on the question of charges for construction

(Testimony of W. S. Hanna.)

cost, but withheld action on the second recommendation until after receipt of the report required.

You will therefore take the necessary action to carry out these instructions. The lands irrigated by ditches constructed by the Government, should be considered for the purpose of the report called for, as not being supplied with water at private cost. It should be clearly explained to the Indians that no irrigation ditches can be made to supply water without being kept in order and that all lands irrigable therefrom will have to bear their proportionate cost of the maintenance and operation expenses. For the present season this charge will not be assessed against Indians, but will be borne by the tribe through reimbursement of appropriations made by Congress for carrying on the work of construction. It would be unfair to those Indians whose lands cannot be watered from any ditch to pay out of tribal funds the expense of furnishing water to a favored few, consequently the Office believes the best policy for the next irrigation season would be for all who receive water to pay the maintenance charge.

Allottees using water from private ditches constructed prior to the construction of the reclamation project should be allowed to maintain and operate their own ditches as heretofore, if they wish to do so, at least until the new systems are completed and placed in commission.

There are inclosed herewith copies of Reclamation

(Testimony of W. S. Hanna.)

Service letters bearing upon this subject, which contain instructions for the Project Engineer to make surveys of the private ditches and area irrigated therefrom. The committee should give careful consideration to all evidence of irrigation during the past as well [488] as the present time, the size and capacity of the ditches, with the view of protecting the Indians in private water rights as far as their industry and activity will permit.

Respectfully,

C. F. HAUKE

Second Assistant Commissioner.

[489]

Q. I show you plaintiff's offered exhibit number 8 and will ask you to identify it?

A. This is a certified copy of the report of the committee [213] appointed by the Secretary to investigate private water rights.

Q. What is the date of it?

A. December 10, 1910.

Q. From whom and to whom?

A. To the Commissioner of Indian Affairs; the report is made by Theodore Sharp, Chairman, Superintendent and Special Disbursing Agent Flathead Agency; Alphonse Clairmont, Representative elected by the Indian Council and member of the Flathead Tribe; and A. P. Smythe, Assistant Engineer, United States Reclamation Service.

Mr. Simmons: If the Court please this con-

(Testimony of W. S. Hanna.)

tains the report of the private water rights committee and the recommendations of each right which the committee recommends the Secretary should grant. And I offer the Plaintiff's Exhibit 8 in evidence.

The Court: Any objection?

Mr. Wallace: No objection on the part of the defendants.

Mr. Smith: No objection.

The Court: In evidence without objection.

Plaintiff's Exhibit 8, being the document referred to, was then received in evidence without objection and is a part of the original exhibits on file in this case.

PLAINTIFF'S EXHIBIT 8

Department of the Interior
United States Indian Service
Flathead Agency

Dixon, Montana
December 10, 1919

The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

The first findings on water rights on the Flathead Indian Reservation were submitted by a committee appointed by the Commissioner of Indian Affairs, consisting of Fred C. Morgan, Superintendent of Flathead Indian School, Foster Towle, Assistant Engineer, U. S. Reclamation Service, and Alphonse

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Clairmont, a member of the Flathead Tribe. This committee made a report on the water rights of the Jocko Drainage Basin which was submitted on January 15, 1914.

On July 21, 1917, a committee composed of Fred C. Morgan, Superintendent of Flathead Indian School, F. T. Crowe, Project Manager, U. S. Reclamation Service, and Alphonse Clairmont, a member of the Flathead Tribe, made a report on the water rights of Garden Creek.

Under date of September 17, 1918, Theodore Sharp was appointed to succeed Fred C. Morgan on this Committee and on March 26, 1919, the appointment of A. P. Smyth, Assistant Engineer, U. S. Reclamation Service, to succeed Foster Towle was approved by your office.

The following are the principles observed in making the findings of the Committee last mentioned above, together with recommendation with regard to the taking over of old ditches. [491]

The Committee met on April 28, 1919, at St. Ignatius, Montana, and organized by electing Theodore Sharp as Chairman. All persons owning or occupying land upon or tributary to these streams were notified by published notices in local papers and by posting notices in local postoffices that they might present their claims, if any, in person or in writing to the use of waters of the Flathead Indian Reservation.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Examination of the streams, the works diverting water therefrom and the irrigated lands were made by the Committee in person and an engineer employee of the U. S. Reclamation Service made a map on a scale of 1000 feet to the inch, showing the course of said streams, the location of the ditch or canal diverting water therefrom, and the legal sub-division of lands, which have been irrigated or are susceptible of irrigation from canals already constructed which maps are attached and made a part hereof.

The Committee is required to determine the status of all water right claims conflicting with the United States and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and operation and maintenance cost.

A previous report has been submitted by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and Foster Towle for the lands in Jocko Valley; and by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and F. T. Crowe for lands tributary to Garden Creek.

The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosper-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

ity a reservation of Indian land carries with it an implied reservation of sufficient water, to serve the irrigable land within such reservation, of all natural streams, springs, lakes or other collections of still water within the boundaries of the said tract.

[492]

The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the allotted lands and the unallotted irrigable lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must vest in the United States Government.

Section 9 of the Act of May 29, 1908, authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the provision for the irrigation of the allotted lands and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904.

A right to the use of water of the reservation must be acquired by the beneficial application of water under such rules and regulations as the Secretary of the Interior may make.

In order that equity shall be done to all the various interests involved it is recommended that water rights be determined under the following regulations:

Beneficial use prior to the appropriation by the

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation a limit of two acre feet per acre per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land and no right for the use of water for irrigation can be acquired independent of its use upon and attached to definite tracts of land and that water rights cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be [493] the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as prac-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

ticable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or person shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.

The Committee recommends that wherever practicable the United States refrain from destroying private ditches; that the allottee or his successor in interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a Government ditch he should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction for that acreage that is determined to have a valid water right; but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment. If it is determined that it is to the best interest of the United States to destroy these ditches then said individual or corporation should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction with no charges for operation and maintenance for that portion of his allotment which is determined to have a valid water right. [494]

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Edward Deschamps

Allotment No. 783

E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Edward Deschamps being Allotment No. 783, comprising the E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 18 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that

Joseph McDonald and Joseph Deschamps, in 1906, constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 9.5 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$ and 0.8 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.;

that said 10.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 20.6 acre feet per an-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

num; that none of the remaining area of said allotment has a water right from any source.

Oro Deschamps

Allotment No. 784

W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Oro Deschamps being Allotment No. 784, comprising the W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919.

[495]

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that in 1906

Joseph Deschamp and Joe McDonald constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 4.8 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.3 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.;

that said 14.1 acres hereinbefore described are determined to have a valid and subsisting water right

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

from Post Creek to the extent of 2 acre feet per acre per annum or a total of 28.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

William Deschamps

Allotment No. 781

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. N., R. W.

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the land of William Deschamps being Allotment No. 781, comprising the SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and testimony was taken on November 12, 1913 and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph Deschamps and Joe McDonald in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, [496] T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 9.6 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16 and 1.5 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Sec. 17, T. 19 N., R. 19 W.; that said 11.1 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 22.2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Frank Fiddler

Allotment No. 785

W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Frank Fiddler being Allotment No. 785, comprising the W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913, and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph McDonald and William, Edward and Joseph Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

this allotment; that ever since said date there have been irrigated 0.9 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 17.4 acres in the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; that said 18.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 36.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source. [497]

Duncan McDonald

Allotment No. 561

E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Duncan McDonald being allotment No. 561, comprising the E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913, and

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joe McDonald and William Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N.,

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 7.3 acres in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ and 9.5 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; that said 16.8 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 33.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Florence McDonald

Allotment No. 560

SW $\frac{1}{4}$ NE $\frac{1}{4}$ & NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N.,
R. 19 W.

..... Sec., T. 19 N., R. W.

The Committee, on May 16th, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Florence McDonald being Allotment No. 560, comprising the SW $\frac{1}{4}$ NE $\frac{1}{4}$ & NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919. [498]

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph Mc-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Donald, William, Edward and Joseph Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 6.3 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$ and 1.9 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; that said 8.2 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 16.4 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Mary C. McDonald

Allotment No. 559

SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Mary C. McDonald being Allotment No. 559, comprising the SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 12, 1913 and May 16, 1919.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Joseph McDonald and William, Edward and Joseph Deschamps in 1906 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that ever since said date there have been irrigated 0.8 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ and 2.4 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W.; [499] that said 3.2 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 6.4 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Caroline McKeever

Allotment No. 791

N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 21, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 16, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Caroline McKeever being Allotment No. 791, comprising the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 21, T. 19 N., R. 19 W., and

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Sec. T. N., R. W., and testimony was taken on November 13, 1913 and May 16, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that Caroline McKeever in 1908 extended the McDonald-Deschamps ditch diverting water from Post Creek at a point on the left bank in $SE\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that at various times since said date there have been irrigated 1.3 acres in $NW\frac{1}{4}NW\frac{1}{4}$ and 0.1 acres in $NE\frac{1}{4}NW\frac{1}{4}$ Sec. 21, T. 19 N., R. 19 W.; that said 1.4 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 2.8 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

Emma M. Magee

Allotment No. 688

$E\frac{1}{2}SE\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of [500] Emma M.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Magee being Allotment No. 688, comprising the E $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913, and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that A. D. Magee, the husband of the allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands and diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 40 acres in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and 40 acres in the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W.; that said 80 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 160 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

John Minesinger

Allotment No. 690

S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of John Minesinger being Allotment No. 690, comprising the S $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913 and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that [501] George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 38.7 acres in SW $\frac{1}{4}$ NW $\frac{1}{4}$ and 36.7 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.; that said 75.4 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 150.8 acre feet per annum; that

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

none of the remaining area of said allotment has a water right from any source.

Julia Minesinger

Allotment No. 691

N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of Julia Minesinger being Allotment No. 691, comprising the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913 and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, Sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that George Buckhouse, at that time renter of this allotment, in 1907 and 1908 constructed a ditch diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.1 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$ and 38.3 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.; that said 77.4 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

to the extent of 2 acre feet per acre per annum or a total of 154.8 acre feet per annum; that none of the remaining area of said allotment has a water right from any source. [502]

James Waymack

Allotment No. 689

W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.

..... Sec., T. N., R. W.

The Committee, on May 27, 1919, made an examination in the field of the irrigation system and water rights appurtenant to the lands of James Waymack being Allotment No. 689, comprising the W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec., T. N., R. W., and testimony was taken on November 13, 1913 and May 27, 1919.

From personal investigation on the ground, testimony taken and from facts shown on Plat F-1402, sheet 19, made by an engineer employee of the U. S. Reclamation Service after a survey by transit and stadia, it is determined that A. D. Magee, the step-father of the allottee, in 1908 extended the ditch constructed by George Buckhouse for the Minesinger lands and diverting water from Post Creek at a point on the left bank in SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10, T. 19 N., R. 19 W., for the purpose of conveying water upon portions of this allotment; that since 1908 there have been irrigated 39.3 acres in NW $\frac{1}{4}$ SW $\frac{1}{4}$ and 13 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

17, T. 19 N., R. 19 W.; that said 52.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum or a total of 104.6 acre feet per annum; that none of the remaining area of said allotment has a water right from any source.

This report covers all streams in the Mission, Little Bitter Root, Camas and Lower Joeko Valleys, and includes the following streams and their tributaries:

Sabine Creek

Dry Creek near St. Ignatius

Mission Creek

Ashley Creek

South Fork of Ashley or Dry Creek

Poison Oak Creek

Post Creek

Marsh Creek [503]

Crow Creek

Spring Creek near Ronan

Mud Creek

Ashley Creek near Mud Creek

Courville Creek

Big Creek near Bisson Creek

Dunbay Creek

Minesinger Creek

Bisson Creek

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

Meadow Creek

Moss Creek

Big Creek at Polson

Dayton Creek

Big Creek at Eudora

Sullivan Creek

Little Bitter Root River

Dry Fork Creek

Warm Springs Creek

Markle Creek

Cottonwood Creek

Sweetwater Creek

Michel Creek

Camas Creek

Revais Creek

Selow Creek

Jocko River

The only water rights to the use of the water of these streams are those hereinbefore delineated.

Filings are continually being made in Sanders, Missoula and Flathead Counties claiming rights to the use of the waters of the streams of the [504] Flathead Reservation. These waters are determined by the committee to be a tribal asset of the Indians allotted on the Flathead Reservation and to be appurtenant to the allotted lands and the unallotted irrigable lands as approved by the Secretary of the Interior and settlers on ceded lands are subordi-

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 8 continued)

nate in right to the needs and uses of the Indian allotments and farm units.

Very respectfully,

(Sgd) THEODORE SHARP

Chairman

Supt. & S. D. A.,

Flathead Agency.

(Sgd) ALPHONSE CLAIRMONT

Representative elected by the
Indian Council and member
of the Flathead Tribe.

(Sgd) A. P. SMYTHE

Assistant Engineer, U. S. Rec-
lamation Service. [505]

Q. I hand you Plaintiff's Exhibit 9 and will ask you to identify it?

A. This is a certified copy of a letter addressed to the Secretary of the Interior by the Commissioner of Indian Affairs, forwarding the report of the committee, which is the previous exhibit; and this shows the concurrence of the [214] Acting Director of the Reclamation Service and the approval of the Assistant Secretary of the Interior.

Mr. Simmons: I offer this Plaintiff's Exhibit 9 in evidence.

The Court: In evidence without objection.

(Testimony of W. S. Hanna.)

Plaintiff's Exhibit 9, the document referred to, was then admitted in evidence without objection and is a part of the original exhibits on file in this case.

PLAINTIFF'S EXHIBIT 9

United States Department of the Interior.
Office of Indian Affairs.
Washington.

May 24, 1921

The Honorable

The Secretary of the Interior

(Through Director, Reclamation Service).

My dear Mr. Secretary:

The Commission, comprising the Superintendent of the Flathead Reservation, the Reclamation Service Project Manager, and an Indian selected by the Flathead Tribe, appointed for the purpose of determining old water rights on the Flathead Indian Reservation, Montana, has reported with respect to existing rights of all persons owning or occupying land upon streams within the Flathead Indian Reservation. This report also covers those lands held by eleemosynary societies at St. Ignatius and white owners who have been adopted into the tribes. After having conducted surveys and investigations on the ground and considered testimony brought out at a hearing called for the purpose, the Commission submits its report, consisting of four volumes, as follows:

(Testimony of W. S. Hanna.)

“The Committee met on April 28, 1919, at St. Ignatius, Montana, and organized by electing Theodore Sharp as Chairman. All persons owning or occupying land upon or tributary to these streams were notified by published notices in local papers and by posting notices in local postoffices that they might present their claims, if any, in person or in writing to the use of waters of the Flathead Indian Reservation.

“Examination of the streams, the works diverting water therefrom and the irrigated lands were made by the Committee in person and an engineer employee of the U. S. Reclamation Service made a map on a scale of 1000 feet to the inch, showing the course of said streams, the location of the ditch or canal diverting water therefrom, and the legal sub-division of lands, which have been irrigated or are susceptible of irrigation from canals already constructed which maps are attached and made a part hereof.

“The Committee is required to determine the status of all water right claims conflicting with the United States and to make recommendation as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction and operation and maintenance cost. [507]

“A previous report has been submitted by a Committee consisting of Fred C. Morgan, Al-

(Testimony of W. S. Hanna.)

phonse Clairmont and Foster Towle for the lands in Jocko Valley; and by a Committee consisting of Fred C. Morgan, Alphonse Clairmont and F. T. Crowe for lands tributary to Garden Creek.

“The principles observed in making the findings of the Committee were as follows: The State of Montana was admitted to the Union November 8, 1889, whereas the Flathead Reservation was established by the Treaty with the Indians of July 16, 1855. Water being essential to industrial prosperity a reservation of Indian land carries with it an implied reservation of sufficient water, to serve the irrigable land within such reservation, of all natural streams, springs, lakes or other collections of still water within the boundaries of the said tract.

“The waters of the Flathead Indian Reservation are therefore inseparably appurtenant to the allotted lands and the unallotted irrigable lands of the Reservation, and were, in substance, appropriated to these lands when the Reservation was established, and its control must vest in the United States Government.

“Section 9 of the Act of May 29, 1908, authorizes the Secretary of the Interior to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying into effect the

(Testimony of W. S. Hanna.)

provisions for the irrigation of the allotted lands and the unallotted irrigable lands to be disposed of under the Act of April 23, 1904.

“A right to the use of water of the reservation must be acquired by the beneficial application of water under such rules and regulations as the Secretary of the Interior may make.

“In order that equity shall be done to all the various interests involved it is recommended that water rights be determined under the following regulations:

“Beneficial use prior to the appropriation by the United States shall be the basis, the measure and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation a limit of two acre feet per acre per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appur- [508] tenant to the land and no right for the use of water for irrigation can be acquired independent of its use upon and attached to definite tracts of land and that water rights cannot be detached from the land, place or purpose for which they were acquired without the loss of priority.

“The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act

(Testimony of W. S. Hanna.)

as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

“All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.

“The Committee recommends that wherever practicable the United States refrain from destroying private ditches; that the allottee or his successor in interest be allowed to use his old ditches to irrigate that portion of his allotment that is determined to have a valid water right, but if the allottee elects to exchange his water right for a water right in a Government ditch

(Testimony of W. S. Hanna.)

he should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction for that acreage that is determined to have a valid water right; but that he should be required to pay operation and maintenance charges on the total irrigable acreage of his allotment. If it is determined that it is to the best interest of the United States to destroy these ditches then said individual or corporation should be entitled to a paid-up water right to the extent of one hundred per cent (100%) of the cost of construction with no charges for operation and maintenance for that portion of his allotment which is determined to have a valid water right."

It will be noted that the Commission recommends that in those cases where it is deemed advisable for the United States to destroy private ditches and construct a new ditch, the owner or owners of said old ditch shall be entitled to a paid-up water [509] right to the extent of 100% of the cost of construction, with no charges for operation and maintenance, for that part of his allotment which is determined to have a valid water right. While it is believed to be equitable and just in such cases to grant the Indian what is known as a paid-up water right, nevertheless it is believed that such land should not be granted paid-up operation and maintenance in perpetuity. Such charges are paid annually as a

(Testimony of W. S. Hanna.)

general rule and to concur in this respect with the Commission's report might in the future cause considerable dissatisfaction among various land owners.

It is therefore respectfully recommended that the report submitted herewith be approved with a slight modification relative to the matter of paid-up operation and maintenance charges referred to above, to the effect that the Secretary of the Interior in all such cases shall determine whether or not such persons shall in addition to being granted a full paid-up water right, also be granted free operation and maintenance charges.

Cordially yours,

(SGD) CHAS. H. BURKE

Commissioner.

I concur: May 24, 1921

(SGD) MORRIS BIEN

Acting Director

Reclamation Service.

Approved: Nov. 25, 1921

(SGD) F. M. GOODWIN

Assistant Secretary. [510]

Q. I hand you Plaintiff's Exhibit 10—offered exhibit 10—and will ask you to identify it?

A. This is a certified copy of that portion of the committee report referring to the lands of the defendants in this case; these copies are certified

(Testimony of W. S. Hanna.)

by the Acting Commissioner of Indian Affairs under date December 19, 1939.

Mr. Simmons: It contains the surveys and reports of this engineer in studying these private water rights and report made thereon by the engineer of the Reclamation Service. We offer Plaintiff's Exhibit 10 in evidence.

Mr. Wallace: We have no objection.

The Court: Very well, in evidence without objection.

Plaintiff's Exhibit 10, the document referred to, was then received in evidence without objection and the same is a part of the original exhibits on file in this case.

PLAINTIFF'S EXHIBIT 10

Allottee Florence McDonald Allotment No. 560

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Florence McDonald Allotment No. 560, Sec. 16, T. 19 N., R. 19

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

W., on November 7, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
Florence McDonald	SW $\frac{1}{4}$ NE $\frac{1}{4}$ & NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16-19-19	Post	McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19		8.2	
Description			Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16-19-19.....			6.3	0.0	33.7	Est 38	40.0
NW $\frac{1}{4}$ SE $\frac{1}{4}$ do			1.9	0.0	31.8	35	40.0
Totals.....			8.2	0.0	71.8	73	80.0

This allotment slopes toward the west. The soil is a light loam free from rocks. Water for irrigation is received from Post Creek through the McDonald ditch. There are no buildings on this allotment. It is used for pasture except 6.3 acres of hay in the north forty.

SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., lies on land sloping to the west. A wide coulee runs through the central part from east to west. 6.3 acres of hay are irrigated from the McDonald ditch by allowing the water to flow down the coulee. Near the west boundary a new ditch takes out of the coulee and runs across the Mary C. McDonald allotment [512] to William Deschamps allotment. An old ditch crosses the northeast corner on a ridge but has not been used for some time. 11.9 acres might have been irrigated in the northwest corner at one time. 21.8 acres of pasture may receive a small amount of sub-irrigation from the main ditch.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., slopes to the west. The soil is a black loam comparatively free from rocks and brush except along the dry creek bed crossing from east to west through the center of this allotment. This forty contains 1.4 acres of irrigated orchard in the northwest corner and 0.5 acres of irrigated pasture near the west boundary. The remainder of the forty is good dry pasture.

Allotted Edward Deschamps Allotment No. 783
Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from November 18, 1916 to December 6, 1916; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Edward Deschamps Allotment No. 783, Sec. 17, T. 19 N., R. 19 W., on and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrigated
Edward Deschamps	E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17-19-19	Post	McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	66.7 [513]

Description	Acres Irrig.	Possibly Irrigated	Unirri- gated	Irri- gable	Total Acres
SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17-19-19.....	27.2	1.8	11.0	29.0	40.0
NW $\frac{1}{4}$ SW $\frac{1}{4}$ do	39.5	0.0	0.5	39.5	40.0
Totals.....	66.7	1.8	11.5	68.5	80.0

This allotment is watered from the Deschamps-McDonald ditch.

E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes gently to the west. A flat coulee runs west across the eighty a little south of the center. The north part of this allotment has no signs of any ditch except a ridge that might have been a ditch before being plowed under. The allotment to the west has a flume crossing Mission B Canal. This probably carried a ditch that crosses this eighty. The allotment to the east has four traces of ditches which are quite distinct. There is a drain ditch south of the coulee which drains a swampy brush patch of 11.5 acres into Mission B. There is an orchard covering 0.8 acre in the southwest corner of the north forty. The garden of 0.2 acre is on the west side of the south forty. The house and barn lie to the north of it. Grain has been grown on 19.5 acres of the south forty in 1916. No irrigating was done during the year 1916 according to the son of Raddis, who is

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

living on the allotment. Mission B Canal will irrigate 6.9 acres of this allotment. If the land were cleared there would be about 10.0 acres more irrigable land.

Allotted Oro Deschamps

Allotment No. 784

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from November 18, 1916 to December 6, 1916; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Oro Deschamps [514] Allotment No. 784, Sec. 17, T. 19 N., R. 19 W., on Post Creek and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
Oro Deschamps	W1½SE¼ Sec. 17-19-19	Post	Deschamps-McDonald	SE¼NW¼NE¼	Sec. 10-19-19	69.5	
Description			Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SW¼SE¼ Sec. 17-19-19.....			29.5	0.0	10.5	29.5	40.0
NW¼SE¼ do			40.0	0.0	0.0	40.0	40.0
Totals.....			69.5	0.0	10.5	69.5	40.0

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

This allotment is watered from the Deschamps-McDonald ditch. This ditch takes its water from Post Creek about one-quarter of a mile from Lake McDonald. Joseph Deschamps testified that the ditch had been constructed in 1904.

W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes gently to the west. There is a flat coulee that crosses the eighty a little south of the center. The upper part of the coulee is filled by 10.5 acres of swamp and brush. The rest of the coulee, 14.1 acres, is meadow land. The north 35.2 acres was sown to grain in 1916. This part was probably irrigated at one time but at the present there are no evidences of ditches except a flume over Mission B canal. The south 20.2 acres were also in grain in 1916. It has a well defined ditch which was not used during the past season. Mission B. Canal will irrigate approximately 66.2 acres of this allotment. If the land were cleared there would be about 5 acres more of irrigable land.

Allottee, William Deschamps. Allotment No. 781.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation [515] on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of William Deschamps.

Allotment No. 781, Sec. 16 & 17, T. 19 N., R. 19 W., on November 7, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
William Deschamps	SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16 & SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17-19-19	Post	Deschamps	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	11.1

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16-19-19.....	9.6	9.0	21.4	Est. 38	40.0
SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17-19-19.....	1.5	0.0	38.5	30	40.0
Totals.....	11.1	9.0	59.9	68	80.0

According to the testimony of Joseph Deschamps the Deschamps-McDonald ditch from Post Creek was built in about 1906 and before the Magee ditch was constructed.

This allotment is rather rough with considerable rock. The water is obtained from the Deschamps-McDonald ditch from Post Creek. A new ditch through the center of the Mary McDonald allotment conveys the water to this allotment, the old ditch along the northern boundary being abandoned. From testimony and the appearance of the land

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

the orchard of 0.5 acres is all that was formerly irrigated. [516]

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., contains 9.6 acres of irrigated hay, 0.6 acres of orchard formerly irrigated; also 8.5 acres that possibly have been irrigated. The remainder of the forty is dry pasture.

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., contains 1.5 acres of irrigated hay in the southeast corner. A deep coulee runs east and west through the southern part of the forty. 8.5 acres are dry pasture.

Allottee, Frank Fiddler. Allotment No. 785.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from November 18, 1916 to December 6, 1916; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Frank Fiddler Allotment No. 785, Sec. 16, T. 19 N., R. 19 W., on Post Creek and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrigated	
Frank Fiddler	W1½SW¼ Sec. 16-19-19	Post	Deschamps-McDonald	SE¼NW¼NE¼ Sec. 10-19-19	41.1	
Description		Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NW¼SW¼	Sec. 16-19-19.....	23.7	0.0	16.3	Est 10	40.0
SW¼SW¼	do	17.4	2.0	20.6	38	40.0
Totals.....		41.1	2.0	36.9	48	80.0

[517]

This allotment slopes gently towards the west. The soil is largely black loam with few rocks. The water for this allotment is brought through the Deschamps-McDonald ditch. There are two laterals reachnig this eighty. There are also three short ditches running on to the north forty from the coulee. There are no buildings on the allotment. Apparently they have never received permission to use water from the ditch.

22.8 acres of the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., are sown to grain while 0.9 acres are covered with irrigated timothy. The rest of the forty is covered with thick brush.

SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., has 34.0 acres of cleared land and 6.0 acres of brush in the northwest corner. Of the cleared land 17.4 acres were irrigated timothy plowed up and 14.6 acres of good dry timothy. The remaining 2.0 acres in the southeast corner are apparently irrigated by water coming down the coulee from the Deschamps ditch.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Allottee Duncan McDonald. Allotment No. 561.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Duncan McDonald

Allotment No. 561, Sec. 16, T. 19 N., R. 19 W., on November 7, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
Duncan McDonald	E $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 16-19-19	Post	McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	1.6

[518]

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16-19-19.....	0.0	0.0	40.0	Est. 10	40.0
SE $\frac{1}{4}$ NE $\frac{1}{4}$ do	1.6	0.0	38.4	25	40.0
Totals.....	1.6	0.0	78.4	35	80.0

This allotment lies near the foot of the Mission Range on land sloping toward the west. The northern part of the allotment is covered with timber with a considerable amount of underbrush. The soil is a black loam comparatively free from rock.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

The Joseph McDonald ditch traverses the allotment with a branch leading to the old cabins on the Louie Head allotment.

NE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., is covered with timber and underbrush except a small meadow in the southwest corner surrounding the farm buildings. None of the forty is irrigated.

SE $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., slopes to the south and west and contains 1.6 acres of irrigated hay in the northwest corner near the farm buildings. The water in the McDonald ditch is used for domestic and stock purposes.

Allottee Mary C. McDonald. Allotment No. 559.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Mary C. McDonald Allotment No. 559, Sec. 16, T. 19 N., R. 19 W., on November 7 and 9, 1914, and obtained the following data: [519]

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch	Acres Irrig.
Mary C. McDonald	SE $\frac{1}{4}$ NW $\frac{1}{4}$ & NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16-19-19	Post	McDonald-Deschamps	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19	3.2

Description	Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16-19-19.....	0.8	0.0	39.2	Est 35	40.0
NE $\frac{1}{4}$ SW $\frac{1}{4}$ do	2.4	0.0	37.6	35	40.0
Totals.....	3.2	0.0	76.8	70	80.0

This allotment lies on ground gently sloping towards the west and south. Only a small area is irrigated and about 2/3 of the allotment is covered with brush. The irrigation water comes from the Joseph McDonald ditch. There are no buildings on this allotment.

SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., has a narrow coulee running from east to west. There is 0.8 acre irrigated hay in this coulee near the eastern boundary, the remainder is dry. The area north of the coulee is dry pasture. That south of the coulee with the exception of 0.8 acre of irrigated hay is covered with brush.

NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 16, T. 19 N., R. 19 W., is covered with brush with the exception of 2.9 acres, 2.4 acres of which are irrigated from Deschamps ditch.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Allottee Caroline McKeever. Allotment No. 791.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Caroline McKeever [520] Allotment No. 791, Sec. 21, T. 19 N., R. 19 W., on November 9, 1914, and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
Caroline McKeever	N1½NW¼ Sec. 21-19-19	Post	Deschamps-McDonald	SE¼NW¼NE¼	Sec. 10-19-19	0.1	
Description			Acres Irrig.	Possibly Irrigated	Unirri-gated	Irri-gable	Total Acres
NW¼NW¼ Sec. 21-19-19.....			0.0	1.3	38.7	Est 38	40.0
NE¼NW¼ do			0.1	0.0	39.9	40	40.0
Totals.....			0.1	1.3	78.6	78	80.0

This allotment lies on ground sloping towards the west. The soil is a heavy loam with considerable rock. A ditch has been constructed to the center of this allotment and a very small patch of potatoes was found that had been irrigated.

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 21 contains 1.3 acres of garden near the farm buildings that might have been irrigated. According to the testimony of Joseph Deschamps there were 2 or 4 acres irrigated that are at present irrigated from small streams that come down from the mountains. 38.7 acres of the allotment was grain stubble at time of survey.

NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 21 contains 0.1 acre of irrigated potatoes near the east boundary. The remainder is dry pasture.

Allottee Emma M. Magee. Allotment No. 688.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed on the Flathead Indian Reservation on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Emma M. Magee [521] Allotment No. 688, Sec. 18, T. 19 N., R. 19 W., on November 10, 1914, and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.
Emma M. Magee	E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 18-19-19	Post	Magee-Minesinger	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$	Sec. 10-19-19	15.1
Description		Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$	Sec. 18-19-19.....	0.0	40.0	0.0	Est 40	40.0
SE $\frac{1}{4}$ SE $\frac{1}{4}$	do	15.1	20.0	4.9	40	40.0
Totals.....		15.1	60.0	4.9	80	80.0

A. D. Magee testified that this allotment was all irrigated a few years ago.

NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W., slopes to the southwest. The soil is a good black loam. It was all plowed up in the fall of 1914. It has not been irrigated for the past few years.

SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 18, T. 19 N., R. 19 W., slopes to the southwest. 20.0 acres in the northwest part are plowing 1.6 acres in the southeast corner are used for a yard around the house where A. D. Magee lives. A hog yard in the southwest corner covers 1.3 acres. There are 2.0 acres in the road on the south and east sides. There are 15.1 acres of fairly good irrigated timothy.

Allottee John Minesinger. Allotment No. 690.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service certify that I have been employed

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

on the Flathead Indian Reservation on the survey of private lands from October 30, 1914 to November 30, 1914, that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of John Minesinger [522] Allotment No. 690, Sec. 17, T. 19 N., R. 19 W., on November 6, 1914 and obtained the following data:

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.
John Minesinger	SE $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 17-19-19	Post	Magee-Minesinger	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19		67.8
Description		Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
SE $\frac{1}{4}$ NW $\frac{1}{4}$	Sec. 17-19-19.....	31.8	0.2	8.0	Est 39	40.0
SW $\frac{1}{4}$ NW $\frac{1}{4}$	do	36.0	2.7	1.3	39	40.0
Totals.....		67.8	2.9	9.3	78	80.0

The Magee-Minesinger ditch crosses this allotment, which was all irrigated at one time, according to testimony. The history of the ditch is given in the report on the Julia Minesinger allotment.

SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the southwest. The soil is a good black loam. 6.0 acres in the northeast corner are corrals around the buildings. 0.2 acres in the northwest corner are plowing. 2.0 acres in the southeast corner lie south of the creek and never have been irrigated from the

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

private ditch. The remaining 31.8 acres are good irrigated timothy.

SW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the southwest. 2.6 acres in the northwest corner and 0.1 acres in the northeast corner are plowing and probably have been irrigated. 1.3 acres on two small knolls near the northwest corner are dry. The remaining 36.0 acres are fairly good irrigated timothy.

Allottee Julia Minesinger. Allotment No. 691.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation [523] on the survey of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of Julia Minesinger

Allotment No. 691, Sec. 17, T. 19 N., R. 19 W., on November 6, 1914, and obtained the following data:

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
Julia Minesinger	N1/2NW1/4 Sec. 17-19-19	Post	Magee- Minesinger	SE1/4NW1/4NE1/4	Sec. 10-19-19		
Description			Acres Irrig.	Possibly Irrigated	Unirri- gated	Irri- gable	Total Acres
NE1/4NW1/4 Sec. 17-19-19.....			0.0	23.8	16.2	Est 40	40.0
NW1/4NW1/4 Sec. do			0.1	39.0	0.9	40	40.0
Totals.....			0.1	62.8	17.1	80	80.0

The Magee-Minesinger ditch takes out of Post Creek just below the Deschamps-McDonald ditch. It emerges from the timber on the west boundary near the center of Section 9. It was used to supply Just below this point, a small ditch runs to the right. It runs across a ridge into another coulee near the center of Sec. 9. It was used to supply water for the steam shovel when the Feeder Canal was under construction. The ditch follows along the bottom of the coulee to a point near the west line of Section 9. Here it turns to the right and follows along the ridge to the northeast corner of the Julia Minesinger allotment. Water is turned down the coulee to the Mission B Canal and runs through the sluiceway. The ditchrider stated that in this way they used much of the water from Mission B Canal.

A. D. Magee and John Minesinger built the ditch. Magee claims it was built in 1907 and 1908, while Minesinger claims it was built in 1906. The flume near the headgate was rated by using a float. [524] It was running full with a surface velocity of 1.5

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

feet per second. The area of cross-section was 2.5 sq. ft. which gives a discharge of 3.0 second feet for an average velocity of 1.2 feet per second.

According to the testimony taken by the Commission, all of the Julia Minesinger allotment was irrigated at one time but at the date of survey it was all plowed up except a corral in the southeast corner. It could all be irrigated.

NE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the south. The soil is black loam free from rock. 1.6 acres in the northeast corner lie above the Mission B Canal. 14.6 acres in the southeast corner are grass land used mostly for a corral. 23.8 acres in the west part of is a plowed field, which probably has been irrigated.

NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., slopes to the southwest. The soil is a fair black loam. 0.9 acres in the northwest corner were never irrigated. 0.1 acre along the south line was irrigated timothy in 1914. The remainder is plowed field which probably has been irrigated in former years.

Allottee James Waymach. Allotment No. 689.

Post Creek Near St. Ignatius

I, R. W. Lincoln, Junior Engineer, U. S. Reclamation Service, certify that I have been employed on the Flathead Indian Reservation on the survey

(Testimony of W. S. Hanna.)

(Plaintiff's Exhibit 10 continued)

of private lands from October 30, 1914, to November 30, 1914; that the allotment number and property ownership were taken from the official allotment plats prepared in 1910 under the direction of Fred C. Morgan, Superintendent and Special Disbursing Officer, Flathead Schools; that I made a transit stadia survey of the lands of James Waymach

Allotment No. 689, Sec. 17, T. 19 N., R. 19 W., on November 6, 1914, and obtained the following data: [525]

Owner	Description	Creek	Ditch	Head of Ditch		Acres Irrig.	
James Waymach	W $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 17-19-19	Post	Magee-Minesinger	SE $\frac{1}{4}$ NW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 10-19-19		0.4	
Description			Acres Irrig.	Possibly Irrigated	Unirrigated	Irrigable	Total Acres
NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.....			0.1	0.0	39.9	Est 39	40.0
SW $\frac{1}{4}$ SW $\frac{1}{4}$ do			0.3	0.0	39.7	39	40.0
Totals.....			0.4	0.0	79.6	78	80.0

[526]

Mr. Smith: The intervener has no cross examination.

Mr. Wallace: No cross examination.

The Court: Do you wish further exhibits produced?

Mr. Wallace: Yes, may it please the Court . . .

The Court: Well, if they are in the possession of the [215] government, they will be brought here

(Testimony of W. S. Hanna.)

at ten o'clock tomorrow morning; Mr. Hanna will then resume the stand for cross examination by the defendants.

Witness Excused.

HENRY GERHARZ

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. You may state your name?

A. Henry Gerharz.

Q. What position do you hold with the government?

A. I am the Project Engineer on the Wind River Project in Wyoming at the present time.

Q. Were you employed on the Flathead Irrigation Project previous to your present employment?

A. Yes, I was on the Flathead Project from November 1933 to June 1938.

Q. When you arrived at the Flathead Project to take that employment did you make an investigation of the Flathead Project system?

A. Yes, as soon as I arrived I began becoming familiar with the different physical aspects of the project, made many trips to the lands, and exam-

(Testimony of Henry Gerharz.)

ined the reservoirs and ditches, and found out about water rights and water quantities, supply, and everything of that kind.

Q. Did you come in contact with these so-called Secretarial private water rights? [216]

A. Yes I did; I found that the Secretary had appointed a committee to make a study of diversions and that the committee had made a report which the Secretary had approved, allowing certain water rights to certain lands under dual control; that is, the government had nothing more to do, or seemingly had nothing more to do about the quantities to be diverted and when they were diverted, and that my predecessor had at various times tried to control the amounts of water that were diverted but that he had not, seemingly, realized much success with the job, so I reported this entire matter to my superiors in Washington and asked them for specific instructions as to how to proceed in this matter.

Q. And when did you so report this matter to Washington?

A. I wrote a letter on May 8 and I had a reply dated June 8, 1934.

Q. I hand you plaintiff's offered exhibit 11 and will ask you if that is the—if that is a certified copy of the reply that you received to your letter from the Washington office?

A. Yes, this is the certified copy of the letter appointing me as water commissioner of the Flat-

(Testimony of Henry Gerharz.)

head Project, Flathead Reservation, and instructing me on how to proceed.

Q. And how were you instructed to proceed in the control and distribution of the waters of the Flathead Project? A. Shall I read it?

Q. Well, if you recall you may state it.

A. Well, this letter went on to state that I was supposed to apportion the water to these private divertees and also to apportion the water as between the private divertees and the government project, and that I was to be governed by the [217] findings of the committee, approved by the Secretary.

Q. That is, the findings of this committee of December—reepoting December 10, 1919?

A. Yes.

Q. Which has been introduced in evidence?

A. Yes; and if I found any interference with the distribution of the water I was to report it to the commissioner.

Mr. Simmons: We now offer Exhibit 11.

Mr. Smith: No objection.

Mr. Wallace: No objection.

The Court: Admitted without objection.

Plaintiff's Exhibit 11, the document referred to, was thereupon received in evidence without objection and is a part of the original exhibits on file in this case.

(Testimony of Henry Gerharz.)

PLAINTIFF'S EXHIBIT 11

June 8, 1934

Mr. Henry Gerharz,
Project Engineer.

Dear Mr. Gerharz:

Responding to your letter of May 8 referring to the appointment of a Water Commissioner to supervise the distribution of water flowing within the boundaries of the Flathead Reservation in Montana—

The report of the Commission appointed for the purpose of determining old water rights on the Flathead Indian Reservation in Montana, which was approved by the Department on November 25, 1921, included the following provision:

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

Pursuant thereto, the then Project Engineer, Mr. C. J. Moody, was specifically appointed under date

(Testimony of Henry Gerharz.)

of August 10, 1922 by the Department to act as Water Commissioner on this reservation.

As you state, the Commission itself was discontinued on August 7, 1929, but this did not discontinue the office of the Water Commissioner whose duties are to administer the approved findings of the Commission. [528]

In view of the fact that the Water Commissioner must effect the division of the waters of the reservation between private parties and also between them and the Government irrigation project, it is felt that the Project Engineer is in the best position to perform these duties. Your request to be relieved of the responsibilities in this connection is, therefore, denied and you are hereby specifically appointed as Water Commissioner to do the things contemplated by the Commission's report.

These private water right matters were involved in the so-called "Moody Cases". The Circuit Court of Appeals for the Ninth Circuit reversed the decree of the District Court and remanded the cases with directions to dismiss them for want of necessary parties, unless the plaintiffs, within a reasonable time amended their complaint so as to bring in such necessary parties. Subsequently, in mandamus proceedings the Circuit Court granted our petition for a writ of mandamus against the District Court from proceedings inconsistent with the order of the Circuit Court. Owing to the need to protect the several private water users and the

(Testimony of Henry Gerharz.)

Flathead project in the use of water, it is necessary that some one perform this work, and the Project Engineer is the logical person to perform these services.

In case of interference by the water users with the distribution of the water, you will present the facts to District Counsel Simmons for his consideration and action.

Sincerely yours,
(sgd) WILLIAM ZIMMERMAN, JR.,
Assistant Commissioner.

Approved: Jun 12, 1934

(sgd) OSCAR L. CHAPMAN
Assistant Secretary.

Copy to Supervising Engineer Hanna

Copy to District Counsel Simmons [529]

Q. Are you familiar with the private water rights of the defendants in this case?

A. Yes, I have been over their ditches and know the lands and been over the lands. I might say, in furtherance of my instructions, that naturally I kept some track of the diversions, and as water was—the water supply on the project was very scarce that year, I wrote a letter to certain of the defendants, dated December 18, 1934 . . .

Q. . . . Well before you go any further—what was the reason for your contacting the defendants in this case?

(Testimony of Henry Gerharz.)

A. Well they were diverting waters that either were natural flow from Post Creek or the waters that had been turned out of the McDonald Reservoir, and as I saw it, on account of the water being short, I decided that we ought to save as much of it as possible, and on December 18, 1934, I wrote [218] certain of the defendants telling them that we intended to save as much water in McDonald Lake as possible that year, and therefore we would like to cut down the amount of water that was being turned down the creek during the winter, and in that way save as much water as possible in the reservoir, and I asked them for their cooperation in the matter.

Q. And then what steps did you take to limit the diversion or to attempt to procure the defendants' consent to control their diversion?

A. Early in the season of 1935 I instructed their water master, Mr. Dexter, to establish gauging stations in each of these two ditches, the Magee-Minesinger and the McDonald-Deschamps, and to have these gauges read regularly, and then to have this information brought to his office and for him to calculate the amounts of water that was actually being diverted, and to report to me; then on . . .

Q. . . . Did you formally write the defendants, or notify them?

A. On June 6th or 1935 I had Mr. Sperry measure the streams, and on June 8th I notified . . .

Q. . . . Well did Mr. Sperry measure the streams?

(Testimony of Henry Gerharz.)

A. Mr. Sperry measured the streams and made tabulations of the amount of water he found.

Q. What amount of water were the defendants diverting from the McDonald-Deschamps and the Magee-Minesinger ditches on June 30, 1935, according to the measurements given to you by Mr. Sperry?

A. Mr. Sperry measured 10.2 second feet flowing down the McDonald-Deschamps and 17.6 second feet flowing down the Magee-Minesinger ditch, which was, of course, in excess of [219] what the Secretary had allocated for those streams, so I notified them of the measurements that had been made and quoted the decree of the acreage under each of their ditches, and that they were entitled to two acre feet there actually, and asked them to curtail their diversions.

Q. And on what date was that?

A. That was on June 8, 1935.

Q. Did you write them further, or notify them further?

A. On July 3 I received a letter from Mr. Dexter, the water master, stating that during June the McDonald-Deschamps had diverted an amount of 411.6 acre feet of water, and the Magee-Minesinger had diverted 642.8 acre feet during June, which of course was in excess of the total amount that the Secretary had allowed them for the entire season. So on July 12 I wrote the defendants and quoted the decree of the Secretary to them, telling them

(Testimony of Henry Gerharz.)

how many acres of land the Secretary had stated they were entitled to water rights for and the amount of water, and also quoting to them that each ditch under the Secretarial decree was required to have a suitable headgate at the point of diversion and also a measuring device as close to the headgate as possible, and asking them to install these devices by the first of August, and on August 5 I received a letter from the water master that these devices had not been constructed, so I wrote, in accordance with my instructions as water commissioner, I wrote the district counsel, telling him of the fact and asking him to take whatever steps might be necessary.

Q. During that irrigation season, Mr. Gerharz, did you have available enough storage and normal flow of water to adequately irrigate the lands under the government project? [220]

A. No, we were delivering something like a foot, a little over a foot of water, as I remember it.

Q. Was that enough water to adequately raise a successful crop?

A. That was not what we would call a normal water supply for the project up there.

Q. You could have used all the waters diverted, in excess of the amounts . . .

A. . . . Oh naturally, we could have used it very nicely, the amounts that were diverted by the private divertees.

(Testimony of Henry Gerharz.)

Q. Were any crop losses suffered, to your knowledge, because of your inadequate water supply during 1935?

A. Well of course that would be very difficult for me to say except as one finds in one season you will burn out, or something of that sort.

Q. It was a short water year however?

A. It was a very short year.

Q. Now did you have these measurements continued after the year 1935?

A. I requested the water master to continue the measurements during the years 1936 and 1937, and until I left the project.

Q. And during the years 1936 and 1937 did the measurements show any increase or decrease over the amounts diverted in 1935?

A. Well I don't happen to have the records here but my memory is they increased.

Q. During those years 1936 and 1937?

A. Yes.

Mr. Smith: We have no cross examination.

[221]

Cross Examination

By Mr. Wallace:

Q. Mr. Gerharz do you know whether or not the amount of water that the defendants diverted through those ditches was actually used by them on the land occupied by them, respectively?

A. You mean whether they pro rated among themselves?

(Testimony of Henry Gerharz.)

Q. No I don't mean that, I meant, they used this water on their respective lands, so far as you know?

A. Well they either used or wasted it, I couldn't tell as to that.

Q. That's what I'm getting at; was there any contention, and is there any contention on your part at this time, that any of these defendants wasted any water?

A. Of course that is a long time ago, it would be hard for me to remember, but if the water users under the project used one foot and the water users under these two private ditches used six or seven or eight feet, why either they were not using the water to very good advantage, or they were wasting it.

Q. Well you already said that one acre foot was not nearly enough water, didn't you?

A. I haven't said nearly enough, I said it wasn't an adequate supply; I would say you would have to increase that.

Q. Well do you know whether or not the defendants used all of the water that they diverted beneficially on their lands occupied by them, or whether they wasted water?

A. Well my answer would have to be no, that I don't know, by going out there and seeing and having the direct knowledge at the present time, but from my experience I would [222] say they wasted it.

(Testimony of Henry Gerharz.)

Q. But that is only from your experience and not from actual knowledge?

A. I wouldn't remember, no, of ever having gone out there and seen them wasting it.

Witness Excused

C. H. DEXTER

was called as a witness on behalf of the plaintiff and having been first duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. State your name? A. C. H. Dexter.

Q. What is your position?

A. Watermaster at Post subdivision.

Q. How long have you been Watermaster of the Post subdivision? A. Since 1914.

Q. And that subdivision is located near the lands of the defendants in this law suit?

A. The north side of Post Creek.

Q. Well you are of course familiar with the lands of all the defendants here?

A. I am not—I could find them on the map, but I am not familiar with them.

A. In 1935, were you water master of the Post subdivision then? A. Yes. [223]

Q. Were you instructed by the project engineer to have made water measurements of the diversions

(Testimony of C. H. Dexter.)

of the defendants from the Magee-Minesinger and McDonald-Deschamps ditches? A. Yes sir.

Q. Will you state when you started having these measurements made during the irrigation season of 1935?

A. I think it was June 6, the first measurement was made, of 1935.

Q. How were these measurements made?

A. By the use of a current meter.

Q. Will you explain the use of the current meter and state what was done by you in connection with these measurements?

A. Well Mr. Sperry made the measurements; I don't remember whether I was with him on that occasion or not.

Q. That was with the current meter?

A. Yes.

Q. Now will you explain a current meter, how it is used and what its purpose is?

A. Well a current meter is an instrument to measure water; I think it has five cups on it, rotating on an axis; it runs free in the water, and it probably has been tested against a weir or dam, I suppose, some place, to determine how fast it runs; I am not familiar with all parts of it.

Q. Well that gives the rate of the flow?

A. That gives the rate of the flow.

Q. And did you have a gauge placed in the stream at the point of measurement?

(Testimony of C. H. Dexter.)

A. Yes, at the point of measurement there is a foot gauge or maybe a foot and a half or two feet, whatever the depth of the water it is placed at, a cross depth in area is taken [224] of the stream and probable depth taken every two feet across the stream to get the average depth of the stream, and the current meter is used in between each one of these to get the velocity of it, and the area is figured by the width—the depth—and when this area has been computed you add up the inches for that amount of gauge height; and in reading the stream they generally start out with a small amount of water, say a couple of second foot as a start, and read it there, and then raise the stream, and then read it again, and each day the gauge is read.

Q. Then you can compute from the gauge readings the amount of water diverted that day?

A. Yes.

Q. Now did you have gauges placed in the two ditches, in the McDonald-Deschamps and the Magee-Minesinger ditches? A. We did.

Q. And where in the ditches did you have those gauges placed?

A. Well the gauge in the Deschamps-McDonald ditch was about 66 feet—no, about 80 feet below the headgate, the present headgate that is in there now, and in the Magee-Minesinger—

Q. —And that gauge was above all the diversions of the defendants on that ditch? A. Oh yes.

Q. Go ahead?

(Testimony of C. H. Dexter.)

A. And the gauge in the Magee-Minesinger ditch—could I refer to a note on that?

Q. To refresh your recollection, yes. That note was made by you at the time?

A. The gauge in the Magee-Minesinger Ditch is 289 feet [225] below the turnout.

Q. That is above all these points of diversion of these defendants under that ditch? A. Yes.

Q. Now Mr. Dexter were separate gauge readings taken on each of these ditches during June, July, August and September of 1935?

A. Well there may have been a day or two along that they were not taken, but practically every day.

Q. Now when you say there was a day or two they were not taken, what did you do in regard to estimating the water diverted that day?

A. Well we would generally—I think our procedure was to take the day previous reading and putting it down, and a great many stations or times it showed exactly the same reading from one day to the next.

Q. That is common practice? A. Yes.

Q. With people who measure water, in the United States Geological Survey, to your knowledge. A. Yes.

Q. And it is a fairly accurate method of calculating the amount diverted when you have the amount calculated for the majority of days?

A. Yes.

(Testimony of C. H. Dexter.)

Q. Did you take all of these readings?

A. Oh no.

Q. Who took them?

A. Well my ditch riders probably took some of them, part of them. [226]

Q. And you took some of them?

A. And I took some of them.

Q. And how were they accumulated—how were they reported?

A. Well I had a book in the office and when they came in at night we always put the gauge readings in that book of whoever read it, and measured it, and then read it.

Q. Did you have the ditch rider reduce the gauge readings—I mean estimate the amount of acre feet diverted each day, from the gauge readings?

A. Not each day, but at the end of the month I used to total them up.

Q. Do you have that book here?

A. I have the book of the gauge readings, yes.

Q. And that is the book that has been in your possession—it is an official project record book kept by you? A. Yes.

Q. And you were acting under the directions of the project engineer? A. Yes.

Q. Can you tell me how much water was diverted by the defendants under the Magee-Mine-singer Ditch for the months of June, July, August

(Testimony of C. H. Dexter.)

and September, 1935, according to the calculations in your book and the computations made by you?

A. I only have the gauge readings in here; the computations are in the project office, I think Mr. Sperry has them.

Q. You have the gauge readings? A. Yes.

Q. Have you computed those gauge readings yourself? A. Yes.

Mr. Simmons: Well can we have a few minutes adjournment— [227] you say the totals are in the hands of Mr. Sperry?

The Court: Yes, we will adjourn until ten o'clock tomorrow morning; it is five o'clock.

Whereupon at five o'clock p. m. of said day adjournment was had until ten o'clock the following morning, May 7, 1940, at which time the trial was resumed, with the witness Dexter resuming the witness stand.

The Court: Proceed.

Q. Mr. Dexter you now have the totals of the amounts of water in acre feet? A. I do.

Q. Diverted by the defendants from the Magee-Minesinger Ditch? A. I do.

Q. During June, July, August and September of 1935? A. Yes.

Q. Will you read these totals by the month, first through the Magee-Minesinger Ditch?

A. June 1935, 689.01.

Q. Acre feet? A. Acre feet.

Q. During July?

(Testimony of C. H. Dexter.)

A. July, 683.65; August, 596.01; September, 212.23.

Q. Now have you totaled those figures for those four months, and if so will you read the totals?

A. Total, 2180.90.

Q. Now Mr. Dexter will you refer to your figures for the diversions made by the defendants from the McDonald-Deschamps Ditch during June, July, August and September of 1935?

A. June 1935, 421.66; July, 356.20; August, 188.41; [228] September, 85.64.

Q. And the total for those four shows?

A. 1051.91.

Q. And those figures are all in acre feet of water diverted? A. Yes.

Q. Mr. Dexter following the year 1935 did you make similar measurements during 1936, 1937, 1938 and 1939? A. We did.

Q. And did you following the same procedure as you have testified to? A. Yes.

Q. Relative to the year 1935? A. Yes.

Q. Do you have in your record, in the official water record book kept by you under the direction of the project engineer the amounts diverted by the defendants during—through the McDonald-Deschamps Ditch—during the months of June, July, August and September of 1936? A. Yes.

Q. Will you read those figures?

A. June 1936, 352.63; July, 392.29; August, 218.18; September, 68.64.

(Testimony of C. H. Dexter.)

Q. And the total? A. 1031.74.

Q. Do you have the figures for the amounts diverted during 1936 for those defendants through the Magee-Minesinger Ditch, and if so, just read them?

A. June, 674.37; July, 956.97; August, 588.06; September, 261.75.

Q. And the total? [229]

A. Season, 2481.15.

Q. Now for the year 1937 if you will read them from the McDonald-Deschamps Ditch?

A. 1937, McDonald-Deschamps: June, 345.51; July, 343.93; August, 376.40; September, 188.10.

Q. And the total?

A. Season, 1253.94.

Q. Now from the Magee-Minesinger Ditch for the year 1937?

A. June, 519.75; July, 803.68; August, 495.99; September, 336.60; season, 2156.02.

Q. Through the McDonald-Deschamps Ditch for the year 1938?

A. June, 467.95; July 453.91; August 336.50; September, 231.96; season, 1490.32.

Q. From Magee-Minesinger Ditch for 1938?

A. June, 707.65; July, 831.40; August, 533.02; September, 483.09.

Q. For the year 1939 from McDonald-Deschamps Ditch—or the total, pardon? A. 2558.16.

Q. Now from McDonald-Deschamps Ditch for the year 1939?

(Testimony of C. H. Dexter.)

A. June, 229.28; July, 488.66; August, 447.68; September, 291.65; season, 1457.27.

Q. From the Magee-Minesinger for the year 1939?

A. June, 187.70; July, 817.54; August, 460.55; September, 308.88; total, 1774.67.

Q. Was the method used in measuring these waters and in computing the amount in acre feet diverted by the defendants during those years 1935 to 1939 inclusive, a standard method of measurement universally adopted and used by the United States Geological Survey and of the Bureau of Recla- [230] mation? A. Yes sir.

Q. You testified as to the diversions made, in acre feet, by the defendants, from these ditches, during five months of the irrigation season; do you know whether or not they diverted any waters in other diversions during the year, outside of the irrigation season, from these ditches?

A. Yes sir.

Q. Did you make any accurate measurements of those diversions?

A. Well we estimated the amount of water and kept track of them; sometimes it was below our gauge readings.

Q. There was water, however, diverted during other months? A. Yes.

Q. Could that water have been impounded in government storage projects and used on project

(Testimony of C. H. Dexter.)

lands had the defendants not diverted other waters?

A. Yes sir.

Q. You are familiar, of course, with crop conditions and with the lands in general in your Post Creek subdivision?

A. Yes sir.

Q. About how many acres were irrigated in the Post subdivision of the Flathead Irrigation Project in 1935?

A. About 18,568.

Q. Did you have an adequate water supply, including your storage?

A. No sir.

Q. To adequately irrigate those lands during 1935?

A. No sir.

Q. Do you know the amount of water, approximately, that [231] each acre under the project, under the Post Subdivision of the Flathead Project, received during the year 1935?

A. Yes sir.

Q. And how much was it, actually delivered on the lands?

A. .92 of an acre foot.

Q. What effect did this water shortage have upon the lands under the Post Subdivision of the Flathead Project during 1935?

A. Well it had a tendency for each farmer to cut down his acres in his farm, so that what waters he had he could put more on crops that was more profitable than some others. And in a great many cases they didn't irrigate the alfalfa later in the season because of the shortage of water and saving the water for their beets, and if they had beets, potatoes, clover seed, and such crops in then, and

(Testimony of C. H. Dexter.)

they were running a shortage of water, it cut down their income and made it pretty hard for them to pay their o. and m. charges, and handle their operations.

Q. That is, the operation and maintenance charges? A. Yes sir.

Q. Now if the defendants had confined their diversions to the amounts of water allocated by the Secretary, and those waters used in excess had been controlled—in excess by the defendants—had been controlled, what effect would that have had upon the crops in your subdivision, in the Post Subdivision, on the Flathead?

A. Well any time you got more water why you got more crops, and it helps them out that much.

Mr. Smith: No cross examination.

Cross Examination

By Mr. Wallace: [232]

Q. You only had the one meter gauge in each of those two ditches that you testified to?

A. They were both read by the same meter.

Q. And they were not near the head of the ditch? A. Very close.

Q. Of course there was considerable loss of water by seepage and evaporation before this water in these ditches reached the land of the defendants after it passed your measuring device?

A. I am not familiar with that at all, I don't know whether there was or not.

(Testimony of C. H. Dexter.)

Q. Approximately how long is the McDonald-Deschamps Ditch from the time it leaves Post Creek until it reaches some of the lands of the defendants?

A. Why you might look on the map which would tell you, but outside of that, I don't know.

Q. Just approximately?

A. I judge probably two miles.

Q. And the Magee-Minesinger Ditch, it is, just approximately, how long, from the time it leaves the Post Creek until it reaches the Minesinger land?

A. Well I misunderstood your first question; the Magee-Minesinger Ditch probably is two miles, and the McDonald-Deschamps Ditch is less than that, I think.

Q. And do you know whether there is any loss of water by seepage from Post Creek on the defendants lands, or not?

A. Well I rather suppose there is, in the McDonald-Deschamps Ditch, on the Wald ditch—I don't think there is on the Magee-Minesinger, I don't think there is so much.

Q. In your experience as an engineer and water-master you [233] would say there is a loss of water, isn't there?

A. I think there is a loss of water but as to the amount I have no idea.

Q. But there is a loss of water in that ditch isn't there, both in evaporation and seepage?

A. Oh yes.

(Testimony of C. H. Dexter.)

Q. Now on the lands of the defendants, do you know where they are located, approximately?

A. I can't say that I do.

Q. Well you know approximately, don't you, Mr. Dexter?

A. Well they are on the south of the McDonald Lake and in the Mission Division, but where they are I don't know.

Q. And south of Post Creek? A. Yes.

Q. Well does your jurisdiction as water master extend over the territory in the vicinity of where these lands are located? A. It does not.

Q. Your jurisdiction goes—as water master—goes down to Post Creek?

A. To Post Creek on the north side.

Q. And it was your ditch riders that measured the ditches—measured the waters in the defendants' ditches?

A. My ditch riders merely read the gauges.

Q. There is a water master over the territory in the vicinity of where the defendants lands are located, isn't there? A. Yes.

Q. And Mr. Montjoy? A. Yes. [234]

Q. And he has ditch riders?

A. And he has ditch riders.

Q. Will you explain to us, please, how it came that your ditch riders measured these waters in these ditches, out of your territory?

A. Well I have taken care of all the waters in Post Creek—that is, our water runs north—I take

(Testimony of C. H. Dexter.)

care of the waters in Post Creek and I also take care of the water that is diverted from Post Creek between the Pablo Feeder and McDonald Lake, but as far as the land is concerned, I have nothing to do with the land whatsoever.

Q. Now most of these gauge readings were taken by ditch riders; not by yourself?

A. A great many of them were taken by myself and some by the ditch riders.

Q. Well let me ask you this, if you know, most all of the defendants lands, with the exception of the Alexander tracts, are located west and below the Pablo Feeder Canal? A. Yes.

Q. And most of the lands, or all of the lands of the defendants on the McDonald-Deschamps Ditch, except the Alexander tract, is located east, or above the Pablo Feed Canal? A. Yes sir.

Q. So that if these defendants used an excess of water on their lands this water that was in excess would be picked up in the Lateral B, government canal below, wouldn't it? A. Yes.

Q. And now as to the lands of Mr. Wald, those lands lie—in other words, Lateral C Canal goes through those lands, doesn't it? [235]

A. I think it does.

Q. So that if he were wasting much water, or using water in excess, part of that water or all of it would be picked up in the Lateral C Canal, wouldn't it? A. Yes.

(Testimony of C. H. Dexter.)

Q. When you were speaking of the Post Subdivision and the irrigation in 1935, just where is the Post Subdivision?

A. Well the Post Subdivision is that part of the Flathead Project that lies north of Post Creek and Mission Creek and south of Crow Creek, and the Pablo Feeder Canal on the east and the Flathead River on the west.

Q. I am interested in knowing if there is any part of the Post Subdivision south of Post Creek?

A. There is not.

Q. It is all north of Post Creek?

A. It is all north of Post Creek and south of Crow Creek.

Q. And were these gauge readings during the months of June, July, August, of the years you have testified to, taken daily?

A. Well practically; there may have been a few Sundays they were missed, or sometimes in the middle of the week, but generally every day.

Q. Were there any times that you took the readings yourself that you found the water shut down to a very small quantity?

A. Oh yes,—and it was so recorded.

Cross Examination

By Mr. Smith:

Q. Mr. Dexter, with reference to the waste of water by usage of surplus amounts on the lands, do you have some waste within the subsoil?

(Testimony of C. H. Dexter.)

A. I presume there is. [236]

Q. And if waste went into the subsoil by reason of the use of the excess amount that would not be picked up in either Lateral B, under the McDonald-Deschamps Ditch, or in Extension C, under the Magee-Minesinger Ditch, would it?

A. I don't think it would; I don't know the character of that soil but I don't suppose it would.

The Court: You had better qualify your witness; it appears on the record that he has been talking about something that he doesn't know a thing about.

Mr. Smith: It is going to be rather difficult to qualify him as to what he has said.

The Court: Well if you can't qualify him put on a witness that can qualify it; this is encumbering the record with words that mean nothing.

Redirect Examination

By Mr. Simmons:

Q. You testified that certain of this excess water diverted by the defendants empties into Lateral B, and is picked up by the government canal; isn't it a fact—or is it a fact—that there is, or is not, much land upon which the government can use that water below Lateral B after it is picked up?

A. Well it is so intermittent that it doesn't do them any good.

(Testimony of C. H. Dexter.)

Recross Examination

By Mr. Wallace:

Q. Do you recall when it was that the turnout was constructed in the Pablo Feeder Canal, in which parts of the lands of the defendants may now be irrigated from government work?

A. In the Pablo Feeder Canal? [237]

Q. Yes. A. I do not.

Witness Excused.

Mr. Simmons: We have no more witnesses, your Honor. I would like to offer in evidence at this time plaintiff's offered exhibit number 1, being the large map, and Plaintiff's Exhibit number 4, the project map to the left of the large map, and Plaintiff's Exhibit number 5, the certified copy of the report to Congress, showing the cost of the Flathead Project, June 31, 1935.

Mr. Wallace: We have no objection.

Mr. Smith: We have none.

The Court: Very well, these exhibits will be admitted without objection.

Plaintiff's Exhibit 1, the large map referred to, was then received in evidence without objection, and is on file with the original exhibits in the case.

Plaintiff's Exhibit 4, the project map referred to, was then received in evidence without objec-

(Testimony of C. H. Dexter.)

tion and is a part of the original exhibits in the case.

Plaintiff's Exhibit 5, the certified copy referred to, was then received in evidence without objection and is a part of the original exhibits in this case.

PLAINTIFF'S EXHIBIT 5.

Irrigation

10162-32

Dec. 21 1935

The President of the Senate.

Sir:

Pursuant to the provisions of the Acts of April 4, 1910 (36 Stat. 270) and August 1, 1914 (38 Stat., 583), I am submitting herewith three tables representing the cost, cancellations, and other data with respect to Indian irrigation projects as compiled to the end of the fiscal year June 30, 1935.

Sincerely yours,

(sgd) HAROLD L. ICKES,

Secretary of the Interior.

Enclosure 254323

(Testimony of C. H. Dexter.)

Irrigation

10162-32

Dec. 32, 1935

The Speaker of the House of Representatives.

Sir:

Pursuant to the provisions of the Acts of April 4, 1910 (36 Stat., 270) and August 1, 1914 (38 Stat., 583), I am submitting herewith three tables representing the cost, cancellations and other data with respect to Indian irrigation projects as compiled to the end of the fiscal year June 30, 1935.

Sincerely yours,

(sgd) HAROLD L. ICKES,

Secretary of the Interior.

Enclosure 254324



(Testimony of C. H. Dexter.)

Mr. Simmons: I may advise the Court that at this time it has been suggested and offered to the Court that the plaintiff does not care to offer any evidence as to the duty [238] of water on the lands of the defendants, for the reason that our evidence as presented to the Court shows that there is not sufficient water to deliver over an acre foot of water in the Post Creek Subdivision; for the further reason that unless it is shown that the burden is on the defendants that the Secretary made an unjust and unequal division of water, in allocating two acre feet, why this is not the time for us to offer such proof; consequently the plaintiff now rests.

The Court: Mr. Wallace I believe there was a witness to be recalled here at ten this morning on some matter you wished to go into.

Mr. Wallace: Mr. Hanna was the witness.

The Court: Do you wish him to resume the stand, so you may examine further?

Mr. Wallace: If I may.

The Court: Very well, Mr. Hanna.

And thereupon

W. S. HANNA,

a witness for the plaintiff, resumed the witness stand, and testified as follows:

Cross Examination

By Mr. Wallace:

Q. Now I show you the Defendants' proposed exhibit 12, and I will ask you what that is, please?

A. This appears to be a certified copy of a letter addressed to the Commissioner of Indian Affairs by the committee appointed to investigate the private water rights. It reads: "It is believed to be a just and correct measure of private water rights, and having already received Department approval, [239] is made the basis for the findings in the cases covered by this report. It is recommended that the findings in the nineteen cases covered by this report be approved."

Q. And there is attached to the report one tract of land? A. Yes.

Q. Of Oro Deschamps, number 734; do you know whether that is one of the tracts of land involved in this action, or not?

A. Yes it is one of the tracts involved.

Witness Excused.

Plaintiff Rests.

The Court: Which wishes to proceed now, the defendants or the interveners?

Mr. Wallace: I think it is proper that the interveners should proceed now.

The Court: I think so; he is the moving party at this stage of the case.

Mr. Smith: Yes I think that is true, your Honor.

And thereupon the following evidence was introduced by the interveners in behalf of their case in chief:

Mr. Smith: I now ask the Court to take judicial notice of a report—an excerpt from the Seventh Annual Report of the Reclamation Service, 1908, at pages 100 and 101, of the Seventh Report. I have available for the information of the Court that report, and because the books are books from the University Library I have had an excerpt copied from the material therein contained, for the information of [240] the Court, if that is satisfactory.

The Court: Any objection on the part of any of the other parties?

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: Better have the excerpt marked.

(Identified by the clerk as Intervenors Exhibit 13)

The Court: Has that exhibit been made available to opposing counsel?

Mr. Smith: No it hasn't.

The Court: Well the Court does not care to deal with an excerpt from a record without the record itself being submitted to counsel.

Mr. Smith: Well we will submit the record to counsel.

The Court: So that they may have an opportunity to submit other parts, if they wish.

Mr. Smith: We will make these available to counsel. I now offer in evidence Interveners' Exhibit 14, the same being a certified copy of the order creating the Flathead Irrigation District.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

Mr. Smith: And I particularly refer the Court to page 16 of the exhibit wherein it shows the inclusion of the lands of the intervener, Dennis A. Dellwo, in the district; and in this connection I should like to ask the Court to take judicial notice of Section 7166 to Section 7169, inclusive, of the Revised Codes of Montana, 1921, and the Acts amendatory thereto.

The Court: Revised Codes of Montana '21 or '35? [241]

Mr. Smith: '21.

The Court: Exhibit number 14 will be considered read in evidence; any party will have the right to refer to and comment upon the same or any part of it, at any time during the trial and in briefing.

Interveners' Exhibits 13 & 14 are on file with the original exhibits in this case.

INTERVENERS' EXHIBIT 14.

Exhibit No. 14 is a duly certified copy of the order of the District Court of the Fourth Judicial District of the State of Montana, creating the Flathead Irrigation District as a public corporation under the laws of the State of Montana, describing the lands within the boundaries of the district, which are all within the Flathead Indian Reservation and the Flathead Irrigation Project, and including among others the lands of the intervenor Dellwo as described in the complaint in intervention.

Mr. Smith: I now offer in evidence Interveners' Exhibit 15, the same being a certified copy of the original Repayment Contract between the United States and the Flathead Irrigation District, and also a contract supplemental to the original contract.

The Court: Is there any objection?

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: In evidence without objection.

Interveners Exhibit 15, the document referred to, was thereupon received in evidence without objection, being a part of the original exhibits in this case.

INTERVENERS' EXHIBIT 15

Exhibit No. 15 is a duly certified copy of the original and supplemental repayment contracts between the United States and the Flathead Irrigation District, under which contracts the Flathead Irrigation District binds itself and the lands within the district to repay to the United States the proportionate share of the cost of the construction and operation and maintenance. The District binds itself to use its taxing power to collect the charges from time to time assessed by the United States. The title to the project is stipulated to remain in the United States until the construction charges are paid.

Mr. Smith: May this be received subject to the same ruling?

The Court: It may be considered read and used in the same way as Exhibit 14.

Mr. Smith: I now offer in evidence Interveners Exhibit 16, the same being a certified copy of the patent from the United States to Margarita Gariepy; a deed from Margarita Gariepy to F. L. Gray Company; a certified copy of a deed from F. L. Gray Company to Frank L. Gray; a deed—or certified copy of a deed from Frank L. Gray to C. D. [242] Thompson; and a certified copy of a deed from Charles D. Thompson and wife to Dennis A. Dellwo, all of which deeds cover the E $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 26, Township 20 North, Range 21 West.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

Mr. Smith: It is a chain of title to the lands of the intervenor Dellwo.

The Court: It will be admitted without objection, considered as read, and can be used as Exhibit 14 can be used.

Interveners Exhibit 16, the certified copies referred to, was then received in evidence without objection, and is a part of the original exhibits in the case.

INTERVENERS' EXHIBIT 16

Exhibit No. 16 consists of a patent and several deeds. The patent is for the East Half of the Southwest Quarter of Section Twenty-six, Township 20 North, Range 21 West, M. M., and was issued to a Flathead Indian. The deeds operate to transfer the title to the land described to the intervenor Dellwo in fee simple. [550]

Mr. Smith: I now offer in evidence Interveners' Exhibit 17, the same being a certified copy of the Rules and Regulations adopted for the Operation and Maintenance of the Flathead Irrigation Project.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: It will be admitted subject to the same conditions as 14, 15 and 16.

Intervenors Exhibit 17 was then received in evidence without objection and is a part of the original exhibits in the case.

INTERVENERS' EXHIBIT 17.

Exhibit 17 contains the rules promulgated by the Secretary of the Interior for the management of the Flathead Irrigation Project, August 1, 1932, as amended July 8, 1933. The rules in part are as follows——

1. Organization——

Indian irrigation projects are in charge of a Project Engineer or other appointed employee of the U. S. Indian Service who is fully authorized to administer, carry out and enforce these rules and regulations, either directly or through project employees delegated by him, such as watermasters, ditchriders, foremen or other assistants. The Project Engineer or his representative is fully authorized to refuse or discontinue delivery of water to any person who disregards these rules and regulations.

2. Irrigation Season——

The irrigation season for the Flathead irrigation project covers the period from April 15 to October 15. In the event of unusual conditions in the spring, owing to construction or maintenance work on canals or laterals or when the designated opening date appears detrimental to crop production, the proper officers of the

United States are authorized to advance or delay, for a period of fifteen days, the beginning of the season's operation, and a corresponding change may be made for the date of closing the season, if it is to the best interests of the project or the farmers so to do. In no event, however, shall the canals be operated during any one season for a period in excess of six months.

* * * * *

5. Delivery Point.

The general rule of the project shall be one delivery point at the upper boundary of the farm unit or allotment, and the project shall maintain the lateral system to that extent. In special cases where from a cost or topographic standpoint it is impracticable for the landowner or lessee to irrigate the entire irrigable area of his tract from one delivery point, the Project Engineer is authorized to establish additional delivery points but in no instance shall more than one delivery point be established and maintained when the landowner or lessee can at a reasonable expense provide for delivery by the construction of suitable head ditches. [551]

6. Record of Deliveries.

Water users who are entitled to the delivery of water shall file with the ditchrider, or other proper operation employee, forty-eight hours in advance of the time delivery is desired, a

properly signed water request card on which is indicated the time delivery is desired, the description of the subdivision, area to be irrigated, and the turnouts to be used. Printed Water Request Cards will be supplied by the project. Request cards are required for each irrigation, and upon completion of a delivery the water user shall acknowledge same by signing the water request card. Ditchriders are specifically prohibited from making water delivery to any water user until he (the ditchrider) receives notice from the project office that all charges have been paid and proper water request cards have been filed by the water user. Water request cards for all completed deliveries must be filed in the project office at the end of each month during the irrigation season, and he must also file a statement of all uncompleted deliveries with the estimated acreage irrigated under such requests to the end of the month.

7. Duty of Water; Delivery in Periods of Shortage.

Payment of the annual operation and maintenance assessments shall entitle a water user to the delivery of water, without further charge, up to the maximum number of acre feet specified in the annual assessment notice for each acre of irrigable land in the farm unit or allotment. Water will be delivered, subject to the

provisions of these regulations, on a demand basis so long as a sufficient quantity is available for project use. Where the exigencies, however, justify, the Project Engineer is authorized to adopt a rotation system, either for the entire project or for individual units thereof, when, in his opinion, such action is for the best interests of the project in the apportionment to each water user of his just proportionate share of the available water supply.

At any time during the irrigation season when it shall appear, in the judgment of the Project Engineer, that there shall not be sufficient water available to deliver the maximum amount, as provided for in the annual assessment notice, to the entire irrigable area for which application for delivery of water has been made and approved, then the Project Engineer shall be authorized to reduce such amount to the extent that there shall, in his judgment, be sufficient water available to make proportionate delivery to each unit or allotment; and when any unit or allotment shall have had delivered to it the amount so fixed, it shall not be entitled to further delivery of water except when it shall appear that there is a surplus of water available. [552]

It is the duty of the Indian Irrigation Service to furnish water for beneficial irrigation use only, and it is the duty of the water user to assist in the prevention of waste, and also pre-

vent damage to adjacent lands. Water users are responsible for water after it is delivered to their land, and they are required to have their field ditches in suitable condition and of such capacity as to permit the use of economical heads.

8. Waste Water——

Water users will be required to construct and maintain in good order and repair upon their lands, such ditches as may be necessary to catch and conduct to some waste canal, ditch or natural drainage channel, all waste water flowing upon or from their lands. No waste water shall be allowed to flow upon a road or highway right of way, and no waste water will be allowed to collect within twenty feet of any canal or lateral belonging to the United States, nor shall any waste water ditches be constructed within ten feet of any canal or lateral, except at points of intersection or crossing, and such crossing shall be located and constructed only by order and under the direction of the proper employee of the United States. Water delivery will be refused any water user during such time as he fails or refuses to comply with the provisions of this paragraph.

9. Structures——

The necessary headgates, checks and measuring devices will be installed by the project in canals, laterals and drainage ways operated and

maintained by the project. Any person or corporation contemplating the building of any structure in or across any canal, lateral or drainage way operated and maintained by this project shall first consult the Engineer in charge as to the proper plans, and receive from him a permit to do the work. All persons or corporations are warned against the violation of this section.

14. Assessments——

The annual per acre charge for operation and maintenance shall be levied against the entire irrigable area of each farm unit or allotment to which irrigation water can be delivered from present constructed works. Charges shall become due and payable in accordance with the annual public notice issued each year, and the provisions of the annual public notice regarding refusal of delivery of water in case of delinquency shall be enforced. [553]

15. Interference with Project Operation——

No persons other than those specifically designated by the Project Engineer are authorized to regulate project structures or to interfere in any way with project operated canals or any works appurtenant thereto, or the water flowing therein.

16. Crop and Statistical Report——

A crop and statistical report on forms furnished for that purpose will be taken each year

by the ditchrider or some person authorized to do so. This report will show the number of acres devoted to each crop, total yield and value of crops for each unit of the project and for the entire project.

* * * * *

18. Complaints ———

All complaints must be made in writing to the Project Engineer.

19. In case of dispute regarding application of rules and regulations and decisions of the project engineer made pursuant thereto, appeal may be made to the Supervising Engineer of Irrigation District No. 3 who will adjust the matter or refer same to the Commissioner of Indian Affairs whose decision will be final.

[554]

Mr. Smith: I now offer in evidence Interveners' Exhibit 18, the same being a certified copy of Construction Costs on the Flathead Irrigation Project up to and including June 30, 1938. In this connection I may explain that the exhibit is the same character of exhibit as was introduced [243] by the plaintiff as Exhibit number 5, but brings the totals down to a later date.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: Just what bearing has this exhibit upon the case?

Mr. Smith: It has no specific bearing, your Honor, except that it does show what the United States had done and has expended, and ties into the Repayment Contract, in that it shows what the various land owners have to pay for the construction of the various features of the reservation, and I think it might have some bearing upon the good faith of the United States, as trustee, in adopting the particular system that was adopted for the irrigation of these lands.

The Court: Anybody question the good faith of the United States in this connection?

Mr. Smith: Well no, I think perhaps I misquoted the record as to the good faith; I should have said questioned the right of the United States, or questioned whether the United States, in using the project system as a system for the irrigation of these lands, acted in accordance with its duties as trustee under the Treaty, as interpreted by the Winters case.

The Court: I take it there is no objection to this exhibit?

Mr. Simmons: We have no objection.

Mr. Wallace: No objection.

The Court: In evidence without objection; considered read; it may be referred to by either party at any time during the trial or in briefs. [244]

Interveners' Exhibit 18 was then received in evidence without objection and is a part of the original exhibits on file in this case.

INTERVENERS' EXHIBIT 18.

Exhibit No. 18 is a duly certified copy of a report to Congress showing the cost of the Flathead Irrigation Project to June 30, 1938, to be the sum of \$8,112,649.29.

Mr. Smith: I have here, your Honor, a copy of an exhibit which Mr. Sperry is going to testify from: for the convenience of the Court and counsel I have had a copy prepared so that it may be filed.

GUY L. SPERRY

was called as a witness on behalf of the Interveners, and having been duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. Referring to the Interveners proposed exhibit number 19, Mr. Sperry, I will ask you to look at the first horizontal column on that exhibit and tell the Court what the first horizontal column purports to represent?

A. The column number one, the horizontal column, represents the average delivery of water to the McDonald-Deschamps Ditch based on the entire irrigable acreage of the units on which these Secretarial private rights have been awarded, for the years 1935 to 1939—inclusive, with the acreage.

Q. Now will you refer to Plaintiff's Exhibit 4; I will ask you if the green portion of the area rep-

(Testimony of Guy L. Sperry.)

resents lands which are within the Flathead Irrigation District? A. That's right.

Q. And if the pink portion represents lands which are, or have, the so called Secretarial rights?

A. That's right. [245]

Q. Now in computing the averages included in the horizontal column number one did you include only the lands which were covered by the Secretarial decree or did you include all of the irrigable lands of the defendants, as indicated on that map?

A. This includes both the lands of the Secretarial decree and the irrigable lands that are under the project system.

Q. So that, in other words, it includes both the pink and green lands as shown on that map?

A. Right.

Q. Now then in arriving at the acre foot—feet of water per acre, what sources of water were considered in your computations?

A. Both the diversions by the private ditch—by the McDonald-Deschamps private ditch—and waters delivered from the government systems.

Q. Now then as to the lands marked in green, which are lands under the project system, do those lands receive some diversions from the project system? A. Yes sir.

Q. And do those lands receive, so far as is demanded by those lands, the same amount of water as is received by other project lands?

(Testimony of Guy L. Sperry.)

A. That's right; this water is diverted to these lands if requested and on the same basis as the remaining lands in the project.

Q. Now the calculations shown in the horizontal column number one for the years 1935 to 1939 inclusive, and the averages, are obtained by what mathematical process?

A. They are obtained by taking the acreage for which the [246] Secretarial decree had been granted, and the acreage included under the project system—that is, outside of the—that is, in addition to the private acreage—added together—all waters delivered to the units, both through the private ditch and by the government, and dividing the one by the other and securing the number of acre feet per acre for the entire irrigable acreage.

Q. Now then referring solely to the acreages involved, you have, as I understand it, two sets of acreages, one the acreage of awarded rights by Secretarial decree, and the other the irrigable acreage under the project, is that correct?

A. That's right.

Q. Where do you get the figures of acreage under the Secretarial decree?

A. The acreage under the Secretarial decree was obtained by—obtained from the committee, Secretarial committee, appointed by the Secretary, for the determination of the acreage that should be under the private ditch, or the acreage under the private ditch.

(Testimony of Guy L. Sperry.)

Q. Well let me ask you, did you go to the Secretarial decree itself and ascertain from that the acreage awarded? A. That's right.

Q. And so far as the acreage, the irrigable acreage in the project is involved, how did you determine that?

A. Those are determined by well defined process, by actually going into the field, by surveys in the field by government engineers and surveyors, taking a plane table measurement—that is, a sheet was placed on the plane table and it was scaled 1 inch equal 400 feet; the ditches were actually run [247] out in the field and the acreage, the irrigable acreage determined, eliminating the highest points, that is, points that were too high to be irrigated, lands above the ditch, lands that were too rocky to pay to irrigate, and any other areas that were not irrigable, not deemed to be irrigable; and the same system was used over all the lands on the project.

Q. There was at one time a general classification of lands in the Flathead Irrigation District, wasn't there? A. That's right.

Mr. Smith: In this connection, your Honor, we ask the Court to take judicial notice of the Acts of Congress of April 23, 1904, June 25, 1910, and March 4, 1929.

The Court: Have you the citation of it?

Mr. Smith: Yes, the Act of March 4, 1929 is 45 Statutes at Large, 1539; the Act of April 23, 1904

(Testimony of Guy L. Sperry.)

is 33 Statutes at Large, page 302; and the Act of June 25, 1910 is 36 Statutes at Large, page 740.

Q. And in the course of that classification did the government engineers make a survey of every forty-acre tract within the confines of the reservation?

A. Yes.

The Court: I suggest that the witness be allowed to testify instead of counsel; let him tell us what was done, instead of you asking him if it isn't so.

Q. Tell us what was done with respect to classification of these lands?

A. The lands—the classification of the lands was after the irrigable area surveys had been made in the field of each forty-acre tract, and the sheets contained one acre [248] each sheet contained one acre; these sheets were then taken into the office and the areas, high spots, and those unirrigable areas, were eliminated, and the irrigable area designated upon the sheets, from which these acreages were transferred to the records of the project.

Q. And are those classification records now a part of the official records of the project?

A. They are a part of the official records.

Q. And are they made by you from day to day on the project? A. That's right.

Q. How soon after the actual surveys were made were the records of these facts shown by the surveys put in record form?

A. They were taken off as soon as it was practicable by the force working under the government;

(Testimony of Guy L. Sperry.)

they were immediately transferred, as soon as the areas were determined, they were transferred to the permanent record.

Q. And it was from these records that you took the irrigable acreage that is here involved within the project? A. That's right.

Q. Now then, going to the water diversion figures, how did you determine the amounts of water which was delivered by the project, to the lands involved?

Mr. Simmons: To which plaintiff objects on the ground that it is incompetent, irrelevant and immaterial, not based upon any issue involved in the case, for the reason that this action is an action in injunction and not adjudication.

The Court: The objection is overruled.

Mr. Simmons: Note our exception, please.

A. The ditch rider's duty is to deliver water to the lands [249] requesting it, if they are in a proper status to receive it, in regard to payments; they turn the water out of the canals and measure the water delivered to the land, either by means of weirs, which are measuring devices, or by estimation; daily records are kept on these deliveries and at the end of the month they are turned in to the water master; these records are kept in water record books which are permanent records; at the end of the month the amount of water is computed that has been delivered to each unit or allotment, the total

(Testimony of Guy L. Sperry.)

of these monthly deliveries comprising the total for the season.

Q. And was it from the records kept in the fashion that you have indicated, that you took the figures which you used in estimating the amount of water delivered by the project to the project lands of the defendants? A. That's right.

Q. Now then with respect to the amounts of water delivered through the Magee-Minesinger and the McDonald-Deschamps ditches, is that figure the same one that was given us by Mr. Dexter in his examination today?

A. The water, the amounts of water delivered through the private ditches are the same figures that were used in his computations, plus the water delivered through the government ditches, and then the total irrigable area is used instead of the Secretarial decree; that is the plan.

Q. Now then does column number one correctly show the amounts of water in acre feet, per acre, which were delivered to the irrigable acreages of the defendants, including both project and Secretarial decree lands, through both the project system and the McDonald-Deschamps Ditch, during the years 1935, [250] 1936, 1937, 1938 and 1939?

A. Yes, that's correct.

The Court: I would like to ask a question here, for the purpose of clarifying the matter in my own mind. Will you please interpret the first three lines

(Testimony of Guy L. Sperry.)

at the top of Exhibit 19—"Amounts of water available in acre feet per acre on Flathead Indian Reservation—Mission Valley Division—calculated under different conditions." Now what do you mean by the word "available?"

The Witness: The amounts of water available means all the water from natural flow and storage on this.

The Court: "In acre feet per acre;" what does that mean?

The Witness: The amounts that could be delivered on each—that were delivered on each irrigable acre.

The Court: And dropping down to the number 1, as I understand it, in 1935 it would be 3.61 feet of water available for every acre on the project?

The Witness: No sir, only on the lands under the McDonald-Deschamps Ditch.

The Court: That would mean that there would be available for their use that many acre feet per acre?

The Witness: That actually was delivered to them.

The Court: An acre foot means a foot of water covering a surface of one acre, as I understand?

The Witness: That's right.

The Court: And it is indicated, the figures 3.61, under 1935, means that each acre actually received that under the McDonald-Deschamps Ditch—actually received 3.61 feet of water?

(Testimony of Guy L. Sperry.)

The Witness: Right; and the depth varied from year to [251] year, varying from 3.5 to 5.17, with an average of 4.32.

The Court: Yes, I see that; but the point I was inquiring about was whether they actually received that much water on each acre subject to irrigation, during that year, for the years 1935, 1936, 1937, 1938 and 1939.

Whereupon, at 10:55 o'clock a. m. a short recess was had, at the expiration of which time the trial was resumed.

The Court: Proceed.

Q. With respect to horizontal column number one, does that figure represent actual delivery, figures, for the lands of the defendants lying under the McDonald-Deschamps Ditch?

A. The column one represents the lands lying under the—all the irrigable lands—deliveries to the irrigable—not necessarily under the McDonald-Deschamps Ditch.

Q. But it is an actual delivery figure, rather than an available figure? A. Yes.

Q. Now then Mr. Sperry, referring to horizontal column number 2, will you tell us what mathematical computation you used in determining the figures there represented, for the years 1935 to 1939, inclusive?

A. Column 2 represents the total waters delivered to the land in the McDonald-Deschamps

(Testimony of Guy L. Sperry.)

Ditch, divided by the acreage of the Secretarial decree to the private water rights granted.

Q. Now then in determining the amount of water that you used in that calculation, are the figures which you used there the same as the figures which you used in respect to Column one, in so far as delivering through the McDonald-Deschamps Ditch are concerned? A. Yes. [252]

Q. And were they obtained in exactly the same manner? A. Yes.

Q. And from the same records?

A. And from the same records.

Q. Now then the average figure involved in the horizontal column number 2 is what figure?

A. This figure is the summation of the private rights under this ditch—the figure used is the summation of the private rights?

Q. And did you obtain—where did you obtain that summation—by adding what figures?

A. From the Secretarial decree.

Q. Does horizontal column number 2 correctly show the amount of water in acre feet per acre actually diverted through the McDonald-Deschamps Ditch for the lands which were awarded Secretarial rights? A. It does.

Q. Does the figure shown in horizontal column number 2 represent the actual amounts of water delivered, divided by the acreages involved under the Secretarial decree?

(Testimony of Guy L. Sperry.)

A. Yes. I would qualify that by saying the amounts of water diverted.

Q. The amounts of water diverted from the McDonald-Deschamps Ditch? A. Yes.

The Court: Well what is the distinction there between your statement and the question of counsel? He said "Will be delivered," and you said "Diverted" to.

The Witness: The water is measured at the point of diversion instead of at the lands. [253]

The Court: The amount delivered would be the amount diverted, less the amount lost by evaporation and seepage?

The Witness: Yes.

Q. Now then do you have any calculation which would show the amount of seepage loss in the McDonald-Deschamps?

A. We have had two gaugings made in the McDonald-Deschamps Ditch and the Magee-Minesinger Ditch.

Q. And by whom were those gauges made?

A. Our hydrographer, Mr. Kemp.

Q. And were those gauges made by him in the regular course of his employment by the United States? A. Yes.

Q. Indian Irrigation Service? A. Yes.

Q. And did those gauges become a part of the official records in your office? A. Yes.

Q. Now then can you tell me what the amount

(Testimony of Guy L. Sperry.)

of loss by seepage and evaporation was, as shown by those gauges?

A. As shown by those gaugings on the McDonald-Deschamps Ditch one gauging was taken near the head of the ditch; another was taken a mile and a quarter below—approximately a mile and a quarter below the head of the ditch—on the same day, and the loss was very close to 22 per cent in the McDonald-Deschamps Ditch. In the Magee-Minesinger . . .

Q. . . . Well we will cover the Magee-Minesinger Ditch in connection with other matters. Now then if you will refer to horizontal columns 3 and 4; does horizontal column number 3 correctly show the amounts of water in acre feet per acre which were delivered to the lands lying under the Magee-Mine- [254] singer Ditch through the Magee-Minesinger Ditch, and the government system in connection with the Magee-Minesinger Ditch, and the lands lying under it, with an average of water delivered by the government system?

A. Oh, no water is delivered in this area through the government system.

Q. Now in making the computations in horizontal column number 3 did you use the same method and the same records as you used in connection with horizontal column number 1?

A. Exactly the same methods and the same system were used.

(Testimony of Guy L. Sperry.)

Q. And does horizontal column number 3 show a record of actual deliveries made, divided by the entire irrigable acreage of the lands lying under the Magee-Minesinger Ditch?

A. It indicates the actual amounts, using the diversions instead of the deliveries.

Q. Yes—then it represents the actual amounts diverted to the lands under the Magee-Minesinger Ditch, is that correct? A. That's correct.

Q. Now then in column number 4—horizontal column number 4—is that column figured in exactly the same way and from the same record as horizontal column number 2?

A. Yes that is figured in exactly the same way and from the same record as horizontal column number 2.

Q. And does horizontal column number 4 show correctly the amounts of water in acre feet per acre actually diverted for the lands awarded a right in the Secretarial decree?

A. Yes it does; the only difference between the columns 3 and 4, in this case there being no water diverted through the government system, all the water coming from the private ditch, Magee-Minesinger Ditch, is that the acreage in column [255] 4 is the Secretarial decree acreage and the acreage in column 3 used was the irrigable acreage, which diversion differs somewhat from the Secretarial decree, and where you get the irrigable acreage figure

(Testimony of Guy L. Sperry.)

used in column 3 that is taken from our regular records, as described previously.

Q. From the classification records?

A. From the classification records.

Q. Now if you will refer to horizontal column number 5, I will ask you what that represents?

A. Column number 5 is the average delivery of—well it is the delivery—the average is indicated but it is the delivery—to Dellwo, based on irrigable acreage, and by Dellwo we refer to the area indicated on the map which is the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 26, Township 20 North, Range 21, I believe; and the amounts of water delivered to this particular tract of land were obtained by or from the regular official records of the project and the average of this particular tract was obtained in the same manner as previously described, from the official records, and the total delivery for each year was divided by the irrigable acreage and the quantities indicated in the—under the various years, ranging from .96 of a foot to 1.3 acre feet at the actual deliveries to the lands of this party.

Q. With reference—going back to columns number 3 and 4 I forgot to ask you if you made computations with respect to the—computation of loss—that is, losses by seepage and evaporation, in the Magee-Minesinger Ditch?

A. There was a gauging made on the Magee-Minesinger Ditch on the same date, the same date as on the McDonald-Deschamps Ditch; one gauging

(Testimony of Guy L. Sperry.)

was made near the head of the ditch, near [256] the point of diversion, and the second gauging was made approximately two and a quarter miles from the head and instead of there being a loss indicated in this ditch there was an actual gain of eight percent of water in the ditch, which can be accounted for only by the fact that the McDonald-Deschamps Ditch or other sources of water above were actually draining into the Magee-Minesinger Ditch and adding to the flow at this point instead of there being a loss.

Q. Now then in connection with column number 6 what do the figures shown for the years 1935 to 1939, and the averages, indicate?

Mr. Simmons: Now, if the Court please, we renew our objection to that question, upon the grounds that the question is incompetent and immaterial and has no bearing on the issues involved in this case as to any of the facts disclosed in this so-called schedule or tabulation from which he is testifying as to the average delivery per irrigable acres in the entire Mission Valley Division.

The Court: The objection will be overruled.

Mr. Simmons: Exception.

Mr. Wallace: May it please the Court, I would like to object at this time to this further line of examination, along this line, upon the grounds as stated by counsel for the government and upon the further ground, may it please the Court, that the witness on the stand, as I understand the testi-

(Testimony of Guy L. Sperry.)

mony, as to column 5, has testified that represents the amount of water that was delivered to Dellwo, divided by the irrigable area of that ranch.

The Court: The objections will all be overruled now.

Mr. Simmons: If the Court please, if we could have [257] just a general objection to this line of testimony it would probably speed up this case, if the record may so show.

A. The figures in column 6 indicate the average delivery per irrigable acre to the farm area being irrigated in the entire Mission Valley Division; we didn't take all of the irrigable acreage of the Mission Valley Division but we took the irrigable acreage of the lands irrigated during those years.

Q. Now why did you not take the entire irrigable acreage of the Mission Valley Division, but limited yourself to the irrigable acreage of the farm area; why did you use that one figure in place of the other?

A. Well if we had used the whole irrigable acreage of the Mission Valley it would have, of course, made a much smaller figure, but the defendants were watering the land that was irrigable and they were taking a certain amount of water; if more land had been irrigated in the Mission Valley it would have had to be divided and a lesser amount would have been available, but since the defendants were irrigating such lands as they had in crops, presumably it would hardly have been fair to have used

(Testimony of Guy L. Sperry.)

the gross irrigable acreage and arrive at a figure that was smaller; in other words . . .

Q. . . . Let me ask you this, Mr. Sperry—there are numerous farms, or there are some farms on the reservation and within the Mission Valley Division, which have irrigable land—of farm land, which are not farmed? A. Many of them.

Q. And so that in determining the pro rata per acre share would you include irrigable acreage regardless of whether there is a demand for water for that acreage or not? [258]

A. We use only the irrigable acreage of those farms requesting water, and that naturally gives—would give a larger amount to the farms which are really using the water.

Q. Now then is there a distinction by you between the irrigable acreage of the farms irrigated and the irrigated acreage of the farms irrigated?

A. Yes there is a distinction; the irrigated area of the farms irrigated is also, in general, taking the average, is a bit less than the irrigable acreage of the farms irrigated, for the reason that in many cases if the water is short the user elects to use his quota of the water on such lands as he has that are in crops that he deems of such value that he may let part of his land go dry in order to use the available water as additional water on the land that he figures he will receive the greatest returns from.

Q. And in some years is there the necessity that he do that in order to produce crops?

(Testimony of Guy L. Sperry.)

A. There is particularly during all of these years I would say, in individual cases, that this practice is followed; some elect to spread the water over the entire acreage; some elect to use it on restricted areas; and that is a matter for the individual to decide, and the shorter the water supply the more the tendency to restrict the area over which the water is spread.

Q. In computing the figures shown in the horizontal column number 6 what records were used?

A. The regular project records of irrigable areas, the farms irrigated and the available water supply, that is, the water that is actually delivered to the land, the records from the water record books, the water actually delivered to [259] the land, and divided by the irrigable acreage of the land being irrigated, to obtain a unit figure—acre feet, per acre, delivered in these years.

Q. And does column number 6 accurately show the average delivery for irrigable acreage of farms irrigated? A. That's right.

Q. In acre feet per acre on the entire Mission Valley Division? A. Yes.

Q. Now then you have indicated in your prior testimony that there are certain storage projects on the reservation, is that correct?

A. That's correct.

Q. And how are those—who has constructed those storage projects?

(Testimony of Guy L. Sperry.)

A. Those projects were constructed by the government, for the Flathead Project, and the cost is borne—will be eventually borne by the holders of title to land under the irrigation system.

Q. Now then will you refer again to Exhibit number 4—that's the map with the green and pink, and I will ask you whether the lands shown in pink on that map, which are lands which have Secretarial rights, are in any manner assessed with the cost of the construction? A. No.

Q. Of the irrigation project facilities?

A. No they are not assessed with either construction or operation and maintenance for that particular area.

Q. So that there is no—they are not liable for the payment of any costs—any portion of the construction costs? [260] A. No sir.

Q. Now then will you briefly indicate to the Court, Mr. Sperry, the manner in which the storage facilities actually result in a greater amount of available water—if the Court will pardon me—I assume that the Court is—being a western man—is well acquainted with how that is, but in the event some other court should look into it, they might not know.

The Court: Well if they don't know they will probably pay no attention to it; but it might be well to inform them.

A. The reason for the storage reservoirs is that after the irrigation season is over in the fall there

(Testimony of Guy L. Sperry.)

is always an amount of water running in the various streams, and where every bit of water available is needed for the lands that are under an irrigation project system, it is policy to begin storing the water as soon as possible in the fall and to store it in the winter months and to store it in the spring, during the spring rains, if there are spring rains, and during the period of larger runoff when the snow is gone off the ground in the spring, and off the mountains, generally in the spring when there is a large flow of water in these streams it is collected in the reservoirs against the time when the demand for water will be greater than the supply. This is particularly true of the Flathead Project where most of the streams are comparatively small and where the water supply is low and the demand for water early in the season, of course, is small.

Q. Why is that?

A. The ground is wet, ordinarily, and the hot weather has not come to cause evaporation, and consequently your demand is small in the spring. I might say that from our records [261] the approximate demands for the year are very low in April; usually very little water is delivered in April; in May possibly 15 or 16 percent of the demand covered; in June 25 percent—26 percent; and July possibly the demand will be 31 or 32 percent, and August it will drop off again, somewhere possibly down to 18 percent, and in September it is dropped off yet possibly to eight percent; so that the way

(Testimony of Guy L. Sperry.)

the demand comes it makes it extremely useful to have a large supply of water in the reservoirs at the time of the big demand, that is, larger amount of water available at the time of the big demand, and for this reason we have the storage systems aggregating about 98 thousand acre feet in the Mission Valley.

Q. If the water were allowed to run down the streams in the normal course of nature would all of the water that comes down in the winter and the spring be of use to the farms?

A. The water in the fall, late in the fall, through the winter and in the early spring would be lost entirely and a considerable percentage of the water would be lost during the period of big runoff because the demand is small at that time and the excess water naturally, with no storage, would run down the streams to the river.

Q. Now then with respect to the Polson Pumping Plant—the Polson Pumping Plant—would the water which is taken from those sources be available to any of the lands on the reservation, and particularly to the Mission Valley Division, in the absence of expenditures of money for pumps and pumping equipment?

A. No, naturally they would not.

Q. Now then Mr. Sperry do you have in your office any [262] record which indicates the amounts of water which are stored on the reservation each year?

(Testimony of Guy L. Sperry.)

A. Yes we have records in the office that shows the storage on the first of the month of each month during the irrigation season particularly, and the records indicate that the storage increases up to the first of July and from then on the demand exceeding the supply of the storage, of course decreases, and from these records we find various—various amounts available in storage on the first of July of each year, and we have in determining how much water will be delivered within storage made an assumption that 50 percent of the water in storage would be available for delivery to the land.

Q. By that you mean that 50 percent of the water which is available would be actually—reach the land—would actually reach the land, and that this amount of water would not be available except for storage, and then what do you base the 50 percent loss of water in storage—that is, where do you get that statement?

A. This figure cannot be definitely determined; it is a matter of judgment and experience and from our general knowledge, of long years of operation, from knowledge of the water masters, and such records as it is possible to keep, that is our best judgment that at least that amount can be delivered to the land, that would not be available except for storage.

Q. Now then as I understand it you use the figure at the first of the year to indicate the maximum amount of storage?

A. That's right.

(Testimony of Guy L. Sperry.)

Q. And in your opinion is the amount of water which is in [263] storage on the first of July, actually water which would have been lost had it not been for the storage projects? A. Yes.

Q. Now then in calculating column number 7 did you use the entire records—or what records did you use?

A. We used the records of the amount of water actually delivered to the land, by our official records, and deducted from this amount actually delivered 50 per cent of the amount in storage on July first, and divided that by the irrigable acreage of the lands irrigated for each particular year, and obtained the unit figures indicated in the columns 1935 to 1939.

Q. Now are the records of storage, records which are official records in your office? A. Yes.

Q. By whom are they prepared?

A. The records are turned in by the water masters at the end of each month; they read the gauges in their reservoirs, which gives the elevation of the reservoir, elevation of the water surface at that particular date, and from their rating tables, which have been previously prepared by the engineers, for the various elevations and reading gauges and from the rating curve or capacity curve taken of the storage at that particular time, and this is turned in to the government from the head office.

Q. And are all the records that you use in con-

(Testimony of Guy L. Sperry.)

nection with horizontal column number 7 official records of your office? A. Yes.

Q. Now . . .

A. . . . Except the computation, of course. [264]

Q. Now referring to column number 8, what does that indicate?

A. If instead of using the irrigable area of all lands irrigated we had used—we did in this column use—the irrigable area of the lands which were originally Indian allotments, and the amount of water delivered to the lands, of course, is the same amount that we have taken from our official records in the previous computations and calculations, that is made in the same manner on the unit acre feet delivered to the land obtained in the same manner, for the years 1935 to 1939.

Q. Now then in computing the figures in column number 8 did you use the entire irrigable acreage of Indian allotments?

A. Of those irrigated for that particular year.

Q. That is, you used the irrigable acreage of these Indian allotments which did not demand water during the particular year involved?

A. That's right.

Q. And does column number 8 represent an actual delivery figure or is that simply a theoretical figure of what could have been delivered?

A. That is a theoretical figure of what could have been delivered had all of the water available

(Testimony of Guy L. Sperry.)

in that particular year been delivered to these particular lands.

Q. And does column number 8 correctly show the amount of water which could have been delivered to the irrigable acreage of the farms irrigated which were originally Indian allotments, if no water had been delivered of the surplus under allotted land on the reservation? [265]

A. That's right.

Q. And in making your computations in figures number 8 all of the records used in that connection were your official government records?

A. Yes.

Q. Column number 9 indicates what?

A. Column number 9 indicates the theoretical figure that could have been delivered to the lands referred to in column 8, had we deducted acreage as in column 7.

Q. Were the records used—the computations of the figures shown in column 9, the same records which were previously used in connection with column 8 and column 7? A. Yes.

Q. And does column 9, then, correctly show the theoretical figures of the amounts of water that could have been delivered to the irrigable acres of the farms irrigated which were originally Indian allotments, if only the normal flow of water had been used?

A. That's right, on the assumption that 50 percent of the stored water would have been deducted.

(Testimony of Guy L. Sperry.)

Q. Now then in connection with what does column 10 represent?

A. Column 10 represents the amount of water that would have been available to the farm units of the Indian allotments, were each diversion two acre feet per acre; if we had taken the area of the Indian allotments which—that is, original Indian allotments—which were actually irrigated, and supplied two acre feet per acre to each irrigable acre of those Indian allotments there would have remained for the farm units the acre foot units indicated in the various [266] columns.

Q. Now then Mr. Sperry with respect to the whole of Exhibit 19, are all of the records which were used in making all of these computations, available in the United States Court building here today? A. Yes they are.

Q. And you have a man here from your office, do you, who would be willing to assist counsel for each of the parties in making an inspection of all or any portion of these records? A. Yes sir.

Q. Does the figure in column 10 include storage figures—does that include both storage and normal flow? Of water?

A. The figures in column 10 indicates storage and natural flow.

Whereupon at 12:00 o'clock noon of said day, recess was had until 2:00 o'clock p. m., when the trial was resumed.

(Testimony of Guy L. Sperry.)

Q. Mr. Sperry with reference to Exhibit 19, do all of the figures used in that exhibit refer exclusively to the Mission Valley Division of the project?

A. Yes sir.

Q. And could you go to the map, Mr. Sperry, Exhibit 4, and indicate to the Court the point at which the gaugings to determine the seepage and evaporation loss in Magee-Minesinger and McDonald-Deschamps ditches were made?

A. The gauge—one set of gaugings were made near the creek, near the point of diversion, and on the McDonald-Deschamps Ditch the exact point I can't designate, but it is about a mile and a quarter below the point of diversion, and above the point where there is a division of the waters; it [267] is somewhere in below the NE corner of 16—that is, a short distance below the corner of section 16, which is land now in the ownership of B. W. Alexander. On the Magee-Minesinger Ditch a gauging was placed near the head and at a point approximately two and a quarter miles below the diversion, above any point where the canal had diverted, and it would be not far from the southeast corner of section 8.

Q. Now in making the gaugings at these particular places, Mr. Sperry, are the points at which these gaugings were made the lowest points in the ditch at which they could be made, in making gaugings in the various diversion ditches of the defendants?

A. Yes that is true.

(Testimony of Guy L. Sperry.)

Mr. Smith: I now offer in evidence Intervener's Exhibit 19, except that portion of it reading as follows: "Amounts of Water Available in Acre Feet per acre, on Flathead Indian Reservation (Mission Valley Division) Calculated under Different Conditions," and ask leave of Court to strike a pencil through that particular portion of the exhibit.

The Court: Is there any objection to the admission of the exhibit.

Mr. Simmons: To which we object on the grounds that it is incompetent and irrelevant and has no bearing on any issues involved in this case; we object to that portion of the exhibit designated as Horizontal lines 4, 5, 6, 7, 8, 9 and 10; we have no objection to that portion of the exhibit designated as horizontal lines 1, 2 and 3.

Mr. Wallace: And the defendants object to the introduction of the offered exhibit number 19—or rather, the horizontal lines number—well the whole exhibit, on the [268] grounds that it is incompetent, irrelevant and immaterial and not proving or tending to prove any material issue in this case.

The Court: What is the purpose in striking out the legend at the top?

Mr. Smith: I think the legend at the top, your Honor, is somewhat misleading, in that the testimony of the witness varies to this extent, that it does not represent the amounts of water available but rather, represents actual delivery figures, and

(Testimony of Guy L. Sperry.)

for that reason I think that the legend at the top should be stricken because it doesn't add anything to the exhibit and does possibly make it confusing.

The Court: On the other hand won't it simply leave questions and answers in the record without any relevancy and without any connection in the case? As I recall it I asked certain questions with reference to the meaning of those words.

Mr. Smith: Yes sir, I think that is true; in view of that, your Honor, we will withdraw our suggestion, and offer Interveners' Exhibit 19.

The Court: Very well, the exhibit will be admitted, over the objection of both parties.

Interveners Exhibit 19, the instrument referred to, was then received in evidence over the objections, identified as such exhibit, and is part of the original exhibits on file in this case.

(Testimony of Guy L. Sperry.)

INTERVENERS' EXHIBIT 19

AMOUNTS OF WATER AVAILABLE IN ACRE FEET PER ACRE ON FLATHEAD INDIAN RESERVATION (MISSION VALLEY DIVISION), CALCULATED UNDER DIFFERENT CONDITIONS

	1935	1936	1937	1938	1939	Average
Average delivery to McDonald-Deschamps Ditch— based on entire irrigable acreage.....	3.61	3.50	4.36	5.17	4.95	4.32
Same based on Sec. Decree.....	9.62	9.43	11.46	13.62	13.32	11.49
Average delivery to Magee-Minesinger Ditch—based on entire irrigable acreage.....	7.95	9.03	7.85	9.31	6.46	8.12
Same based on Sec. Decree.....	7.65	8.70	7.56	8.97	6.22	7.82
Average delivery on Dellwo based on irrigable acreage ¹	1	1.27	0.96	1.25	1.30	1.19
Average delivery per irrigable acre on entire Mission Valley Division	1.15	1.27	0.96	1.12	1.18	1.14
Same as above—deducting calculated stored water.....	0.86	0.73	0.63	0.64	0.64	0.70
Average delivery per irrigable acre possible if only Indian Allotments considered.....	2.34	2.38	1.78	2.18	2.12	2.16
Same as above—deducting calculated stored water.....	1.74	1.36	1.18	1.25	1.16	1.34
Amt. Available to farm units if Indian allotments were each delivered 2 ac. ft. per acre.....	0.33	0.43	0	0.19	0.15	0.22

¹ Record lost.

These tabulations based on irrigable acreage of farms actually irrigated, except as noted.

The irrigable acreage is the sum of Class One and Class Two lands.

(Testimony of Guy L. Sperry.)

Q. Mr. Sperry as I understand it the project has been delivering water to some of the defendants lands under the Magee-Minesinger and the McDonald-Deschamps ditches?

A. Under the McDonald-Deschamps Ditch, yes I believe there [269] has none been delivered from the project system in the Magee-Minesinger Ditch. In the McDonald-Deschamps Ditch the waters that were delivered by the project were delivered from the project ditches for that portion of the irrigable area of the unit which is under the government system, not to the portion that has a Secretarial right.

Q. Now with respect to the project's deliveries to lands under the McDonald-Deschamps Ditch, are those deliveries made into the McDonald-Deschamps Ditch or are they made from any other—from other ditches and at other points?

A. They are made at other points, in general—I couldn't testify that that wasn't done in some instances—I'm not aware whether they were or not—but in general it is through the government ditch and at other points than the points at which the private ditches reach the lands.

Q. What lands are the private ditches used to irrigate?

A. The private ditches are used to irrigate the lands for which the private rights were granted, and I believe in several instances land that is also under the government system and for which there is no

(Testimony of Guy L. Sperry.)

private right, in other words the use of the private water has been extended to cover some of the additional lands even though these were under the government system and water is available for delivery to these lands.

Q. Has that been done with the consent of the project officials?

A. No, with the consent of the government.

Q. Now Mr. Sperry you have indicated prior to this time how these construction charges are borne by the lands lying under the project; well will you now indicate the method [270] in which the operation and maintenance costs of the system are borne?

A. The operation and maintenance costs of the system—that is, of the lands under the system—are borne by each acre of irrigable land, in the same proportion that is, each acre is charged in the same amount, in so far as it is possible.

Q. Now in that connection would lands which are immediately adjacent, let us say, to the source of supply, such as Post Creek lands, in the immediate vicinity of the McDonald-Deschamps Ditch, which are under the project, pay in lesser or different amounts than the lands which are in the vicinity of the intervener, Dellwo's land?

A. No there is no distinction in charges against lands that are near or far from the source of supply; the costs of the distribution of the water and the loss entailed in water diverted from the creek through the canal is assumed by the project as a

(Testimony of Guy L. Sperry.)

whole and the levies are made on the project as a whole on the basis of the irrigable acreage rather than on account of distance from the source of supply.

Q. Do the lands under the McDonald-Deschamps Ditch and the Magee-Minesinger Ditch, which have Secretarial rights, pay any operation and maintenance costs to the project?

A. I don't think that they have paid any for a number of years; it is possible that some years ago there was a time when there was not water available to these particular lands through ditches actually constructed and I believe that charges have not been levied against those lands for a number of years.

Q. Well since 1935 has there been any charges against [271] these? A. I don't believe so.

Q. Now in the actual delivery of waters in the Mission Valley Division project does the irrigation system as it is now constructed and operated deliver equal or unequal amounts to the various owners of lands under the project?

A. The system delivers equal amounts to the owners of lands under the project according to their irrigable area, in so far as is practicable. In a system of the size of the Flathead Project, with as many sources of supply from creeks—numerous creeks, and with as many reservoirs as there are on this particular portion of the project, the Mission Valley, it renders it extremely difficult to de-

(Testimony of Guy L. Sperry.)

liver absolutely the same amount of water to each acre of land that is entitled to it, but an attempt is made to do this, and we have succeeded quite closely in doing this, so that there is not very much inequality. Some years it is possible that lands in one portion of the project may have got a little bit short of their pro rata share on lands and some other extreme portion of the project might receive slightly more than their share, but these variations are quite slight and we attempt to keep them as slight as possible. In order to do that and deliver the amount of water to each tract of land that is entitled to this water and deliver the amount to which it is entitled, it is necessary for us to keep very close supervision over the supply of water; this ordinarily is quite complicated, although not as complicated as might appear on the face of it, inasmuch as early in the season we of course know how much water we have in the various reservoirs, the [272] storage; at the beginning of the season we are quite sure we will be able to deliver for instance three-quarters of a foot or possibly a foot of water per irrigable acre of land on the project. We know that in the first month or six weeks it isn't likely that an individual will actually run this amount of water, so that we can start delivering at the beginning of the season with fair assurance that we are going to deliver at least three-quarters of a foot to a foot to these lands. We have to take stock of the amount of water in storage frequently,

(Testimony of Guy L. Sperry.)

after the irrigation season starts, and get information from the water master as to the probable runoff from their streams, that is, the probable additional water that will be available, from each water master, and from his particular division; and as the year goes on we revise that estimate from month to month; then having all the information as to how many acre feet have been delivered in each division, how much water has been delivered to each unit, how much water these divisions and units still have coming, for an estimated increased quota, and by revising from time to time, we are able to approximate quite closely before the delivery.

Q. What would be meant, Mr. Sperry, by the use of a term such as rotation system, as connected with the irrigation of land?

A. A rotation system, strictly speaking, might mean that water will be turned into a particular ditch for a certain period of time, like a week or ten days, and then would be turned off, possibly put in another ditch, for a week or ten days; that would be, strictly, what is ordinarily interpreted as rotation system. However, in effect, a [273] project that has reservoirs water is a sort of rotation system all the time, as far as individual users are concerned, because the individual user puts in his application for water, giving the ditch rider certain notice in advance as to when he wants water and how much he wants, and he uses this water in the

(Testimony of Guy L. Sperry.)

quantities that he selects as being the most feasible distribution for his particular farm; he then uses this water for several days or a week or ten days and gets over his particular tract, and orders his water cut off, has his water cut off, and all of the users are doing the same thing, so that you have certain users taking the water at one time and certain other users taking water at another time, and practically this amounts to a rotation system.

Q. And that is the system that you have actually employed in the administration of the project?

A. Yes.

Q. Now does the use of a rotation system such as you have described on this project lead to any administrative difficulties in the operation of the project?

A. There are numerous difficulties in connection with the delivering of water to all the lands, inasmuch as we must have the water in the reservoirs on demand for the user at the time that he wants it, and in order to do that, and we have considerable option on the location of our water supply in the reservoirs because of the fact that we can run water through the Pablo Feed Canal north and supply numerous other reservoirs.

Q. Now then in taking care of these day to day demands of the water for the farmers is it necessary to transfer [274] water from one reservoir to another?

(Testimony of Guy L. Sperry.)

A. It is frequently necessary to do that, and that is the purpose of holding the meetings of the water masters and taking stock of the water in storage—location of the water in storage, probable needs of each water master, and in order to ascertain how much water it may be necessary to transfer north to some other reservoir in order to have water on hand at that point for delivery to the lands.

Q. Now then, Mr. Sperry, having in mind the amounts of water available for units on the Mission Valley Division generally, in the years from 1935 to 1939, inclusive, what would you say as to the effect of the water if each farmer had a continuous flow of his portion of water?

A. If each water user took his water by means of a continuous flow, and, for instance had an acre foot of water for the land for the season, and this water was spread over a four or five months period of continuous flow, the amount of that flow would be so small that it largely would be wasted or would require cutting up into very small amounts and which would make it impracticable to get over his land thoroughly and wouldn't enable him to take care of his farming duties such as cutting hay and putting his hay up and getting his crops off the ground, and it would be used to very poor advantage, if that kind of a system were practiced.

Q. Well would such a system result in an actual uneconomic use of water?

A. Very uneconomic.

(Testimony of Guy L. Sperry.)

Q. Now then what does an irrigator or an irrigation engineer mean by the term "Head of water?"

A. By head of water, in some parts of the country that [275] means a more or less definite amount of water; that is a sort of a local usage of the term head of water; for instance in——

The Court: Well we are dealing with the Flathead Reservation and the Flathead Project.

A. (continued) On the Flathead Project by head of water we mean an amount of water with which the irrigator is able to work to advantage in getting over his particular tract of land, considering the needs of that tract.

Q. Is one of your problems delivering the share of water that each user gets in sufficient quantities at different times to give him an adequate head?

A. That is a very important one of our purposes—duties.

Q. Now then, in your opinion as project manager of the Reservation, and acquainted with the use of water thereon, will you say that any system of irrigation on the Flathead Reservation and particularly in the Mission Valley Division, could possibly be economically operated without one unified control?

A. No I think that would be impossible to secure any just and equal distribution of water without some unified control so that you would have—the several agencies would have at hand all the time the amounts of water that had been delivered to vari-

(Testimony of Guy L. Sperry.)

ous lands, the amounts of water that were still to be delivered to those also, in order to make out their quotas, and without someone knowing where the water was located, what reservoir it was in and what the probable amount of water that might be expected in the future would be from the particular streams, otherwise the water would not be where it was needed when it was needed. [276]

Q. Could any individual farmer operating on the reservation, in the absence of a system of central control, determine when he had used his pro rata share of the waters of the reservation?

A. No, he wouldn't know what his pro rata share was, there would be no way for him to find out unless there was some one who had control over the whole system so he would know what the available supply was.

Q. And would that be true, in a lesser degree, to, let us say, several irrigation projects involving many units?

A. Yes it would be true of them also.

Q. Now then, having in mind, Mr. Sperry, these lands of the Flathead Reservation, where you have knowledge of the kind of crops and the character of crops there, as to use and the amount of water used and to deliver, what is your opinion as to whether or not any system of private irrigation, whether conducted by the individuals or by privately organized irrigation districts, could adequately irrigate the

(Testimony of Guy L. Sperry.)

quantity of lands which are now irrigated under the Flathead Indian Project?

A. That system of—you mean numerous smaller districts or ditches?

Q. Yes.

A. Controlled by private individuals?

Q. Yes.

A. Or groups of private individuals? It certainly would not work out to the good of the whole valley; certain groups who were close to the source of supply of the larger streams would be sitting in a preferred position, and as of course regards the amount of water that they could secure, there [277] being a small amount of waste, and as against those people who lie a considerable distance from the source of supply, the parties close to the streams would have a low cost project with little waste of water delivered to their lands and those who were at a distance would have an expensive project, having to construct a long supply canal before it could reach their lands and also to entail considerable loss of water in transmission of the water to these particular tracts, and this would result in arguments and the amounts of water that should be supplied to each particular ditch and it would have to have some central control in order to operate to any advantage at all.

Q. Well knowing the character of the lands and knowing the general yields of the lands in the Flat-

(Testimony of Guy L. Sperry.)

head and particularly the Mission Valley Division, would you say it would be possible for any group of farmers located in the extreme northern end of the Mission Valley Division to build a system to their lands and pay the costs of operation and maintenance which would fall upon them?

A. No I don't think so.

Q. Mr. Sperry, I think this morning, in speaking of the classification records you testified or you said that you had a sheet for each acre, in your classification, is that correct?

A. We have sheets for each section—if I said each acre I didn't intend to—each section we have a sheet for.

Q. Would it be possible, Mr. Sperry, in the nature of things, to adjudicate the waters of this reservation and apply to each acre of irrigable land any definite quantity of water and be assured of delivering that quantity of water [278] to the land?

A. No it would not be possible to do that for the reason that your supply changes from year to year, no two years is the same, and our acreage under the project has increased from year to year—sometimes the increase is considerable—sometimes it is small, but for the last few years it has been a continuous, that is, quite a steady increase; in the early days of the project some years were less than the preceding year but in the later years it has been an increase each year, and it isn't the same each year.

(Testimony of Guy L. Sperry.)

Q. In other words you have two factors, the amount of irrigable land is changing from year to year and the amount of water is changing from year to year? A. That's correct.

Q. In making your assessment for operation and maintenance charges what basis is used?

A. In making the assessment the basis used is the cost of operating the system.

Q. No I don't think you understand me—in the assessment to each farmer, how do you determine his share of the cost of operation and maintenance?

A. Well his share of the cost of the operation and maintenance is a definite assessment against the—each acre of irrigable land; he pays on the basis of the number of acres that he has; and the assessment, or the levy, against the particular tract and against all the tracts summed up, or the amount of money that is available to operate the system——

Q. ——Now then is the irrigable acreage based on that assessment the same figure that is used in your computations [279] in Exhibit 19, where the irrigable acreage is used? A. That's right.

Cross Examination

By Mr. Simmons:

Q. Mr. Sperry has the project at any time been able to exercise any control over the diversions of the defendants through either the Magee-Minesinger or McDonald-Deschamps ditches?

(Testimony of Guy L. Sperry.)

A. The project has attempted in some years back to control the diversions of the defendants; for several years past, before this case has been in a state of expectancy——

Q. ——Well with what effect, Mr. Sperry,—have they ever been able to control all of the amounts allocated by the Secretary?

A. No they have not.

Q. Well why is that? Because of any location of their lands?

A. The difficulty lies, in controlling the water of the defendants in this case—the difficulty lies in the fact that all these ditches take out of Post Creek below our storage supply in McDonald Lake; they are the first diversions below the Lake, and in operating the system and turning the water out of the lake down Post Creek for diversion through the Pablo Feed Canal, and we have to pass the Pablo Feed Canal down to some of the other——

Q. ——The Pablo Feed Canal is located, in other words, below the points of diversion?

A. Yes, and the defendants are in position to divert water when there is water in the creek.

Cross Examination

By Mr. Wallace: [280]

Q. Mr. Sperry these operation and maintenance figures I believe you stated take in the whole irrigable area of the lands affected?

(Testimony of Guy L. Sperry.)

A. We take in the irrigable area of the lands affected, that's right, what we consider as irrigable area at the present time.

Q. And that is true, whether or not the water users use any water for that particular year or not?

A. That's right.

Q. These operation and maintenance figures are not the same in the Flathead Irrigation District as they are in the Mission Irrigation District are they, Mr. Sperry?

A. They are not exactly the same, largely because of the fact that we operate independently in the two districts.

Q. And those two districts are both included within the Mission Valley District, or constitute the Mission Valley District?

A. That's right. I might explain just a little farther, the reason for the difference in the figures; they have an operation and maintenance charge and an administration charge; they are two separate districts; they have their one commissioner, and operate independently, so far as the administration goes; their administrative expenses vary and the collections in the two districts vary; in other words delinquencies in one district may differ from delinquencies in the other district; and for this reason each division, or each district, has to levy an amount and collect an amount sufficient to operate, and this results in some variation in the assessment.

(Testimony of Guy L. Sperry.)

Q. And are those the only reasons why there are variations [281] in the o. and m. charges between the two districts?

A. That constitutes the principal reason, possibly, although there is some difference, naturally, in operating any two different portions of the project, there would be some difference in the expense; it wouldn't necessarily follow that you could operate a 14 thousand acre proposition in one portion of the project at the same price that you might operate a 14 thousand acre proposition in another.

Q. While you testified that you attempted to make the water deliveries approximately equal to all water users on the project, you did take into consideration, did you not, the different character of land, so that some farmer gets considerable more water than others?

A. That's right, that has been the practice on this project to deliver more water to land that is extensively gravel, and the assumption that the requirements or needs of the land, in some degree governs the amount that will be diverted to it.

Q. Now you have referred to Exhibit 19, Mr. Sperry, column number 5—"Average delivery to Dellwo based on irrigable acreage"; let me ask you first, if each water user from the system makes application for water, before his water is delivered to him—if each individual makes application——

A. Yes, either orally or in writing.

(Testimony of Guy L. Sperry.)

Q. But he makes some kind of an application?

A. He makes an application yes.

Q. Now then in making up this column number 5 is that based on the amount of water that was actually delivered to Dellwo or on the amount of water that he may have requested and applied for?

A. That is based on the amounts that were actually delivered [282] to him.

Q. And so the water as delivered in column number 5 may have been all the water that he requested or applied for?

A. It might have been.

Q. Mr. Sperry there have been numerous instances, have there not, where the government, or this system project, has used the Magee-Minesinger Ditch for the purpose of delivering water to people entitled to government water, to whom you couldn't otherwise have delivered water?

A. I don't know, the water master——

The Court: If you don't know, that ends it.

Q. Is there a turnout in the Pablo Feed Canal at the place of the lands of the defendants or is the turn out in the B Canal?

A. I would say that there is some—I can't say how many—in the Feed Canal.

Q. I have reference to the turnout from which you supply water to the defendants in this case?

A. Yes, I say that I am not sure—I'm not familiar with the location of these turnouts—there might be some in both of them.

Q. Then you don't know whether that turnout in the Feed Canal is to Dellwo?

(Testimony of Guy L. Sperry.)

A. I wouldn't know.

Q. Do you know, Mr. Sperry, what percentage the gravity water going to the Mission Valley Division rises in Post Creek, in north of Post Creek?

A. In and south of Post Creek—I will say this is an estimate only, I haven't the figures—I will say more than half, considerably more than half. [283]

Q. Isn't it a fact that it is 70 percent?

A. I couldn't say.

Q. Do you know the irrigable area of the lands in the Mission Valley District?

A. The area of the—irrigable area of the lands in the Mission Valley District is around 13 thousand acres—of the total irrigable area.

Q. The area of the District itself is about 22 thousand? A. That's right.

Q. And do you know what portion, or what part of the lands in the Mission District were owned in allotments?

A. A considerable portion of them, I don't know the percentage, but a considerable portion of those lands were allotments.

Q. Nearly all, weren't they?

A. The larger.

The Court: Now just answer the question—you answer larger.

The Witness: Well nearly all.

The Court: Was it nearly all?

The Witness: I think it was nearly all.

(Testimony of Guy L. Sperry.)

Q. I will ask you if it wasn't about ten-elevenths of the total amount?

A. I couldn't say, I haven't definite information.

Q. Do you know how many acre feet of water is required to irrigate the lands in the Mission District?

A. We have the record of it—I can't tell you off-hand.

Q. Can you tell me whether there are any pumps located in the Mission District, in connection with this district?

A. No pumps in the Mission district. [284]

Q. How much storage water is available for use in the Mission District?

A. Two of our largest reservoirs—that is, one of our largest reservoirs and that will be available for use on the Mission District, is the Tabor Reservoir, with a storage of about 23 thousand acre feet, when the work that is being done on it is completed, and which will be stored; and the Mission Reservoir, with a storage of about 7500 acre feet—are in a position to deliver water to the Mission District.

Q. And McDonald?

A. And McDonald is not in a position to deliver water to the Mission District; this water goes to—into the Post Division and on north into the Pablo Division.

Q. Can you tell me what percentage of the water that rises in the Mission District that is diverted to lands north of Post Creek?

(Testimony of Guy L. Sperry.)

A. Variable amounts, depending on the season; for the past few years this water that has been diverted is largely from excess water from the Jocko Valley; it is averaged roughly at 24 thousand acre feet, that has come through and has been run north to the Pablo Division, I believe, or to the Post Division.

Q. Twenty-four thousand acre feet?

A. Twenty-four thousand acre feet, yes; that is an estimate I think.

Q. And about what percentage of the water is that, if you know? A. I can't say exactly.

Q. Is there any of the water that is pumped in—any of the [285] government pumps—reclamation pumps—available for use actually within the Mission Irrigation District?

A. It is not available for use, that is, pumped water is not actually available for use on any of the land of the Mission Irrigation District; however by virtue of the fact that takes the place of water which has been in the past run from the south end to the north end——

Q. ——I understand, but there is none of the pumped water used in this district?

A. No, not strictly—it is available, but actually not.

Redirect Examination

By Mr. Smith:

Q. As a matter of fact, Mr. Sperry, does any appreciable amount of water that is used in this

(Testimony of Guy L. Sperry.)

project in the Mission District arise within the streams of the district itself?

A. You mean the water that actually rises in the particular district—you refer to the Mission District?

A. Yes—I will ask to strike that—where do the waters of Post Creek come from?

A. The waters of Post Creek come from the mountains, of course.

Q. Are the mountains in the Mission District?

A. No.

Q. The Mission District would, I presume, be the normal watershed for these waters?

A. Yes, part of them.

Q. When water comes out of the Crow Creek pumping plant, and when the waters out of the Polson pumping plant are available, will that have any effect on the amount of water available for use in the Mission District? [286]

A. Yes that will very materially affect the waters available for use in the Mission District.

The Court: How far in the future is that?

The Witness: The pumping plant is available at present.

The Court: We are dealing with 1935.

Mr. Smith: Mr. Wallace went into the matter of the pumps.

The Court: Well go ahead; I didn't think he mentioned the Polson pump.

(Testimony of Guy L. Sperry.)

Q. At any rate, will the operation—and does the operation—of whatever pumping facilities you have, make some difference in the amount of water available for the Mission Valley Division?

A. It very materially affects the available water for the south end of the project, in the same way that it does the other lands in the project, because of the fact that we have in the past been compelled to run water from the south end to the north end of the project, and now we will be able to hold in storage additional waters in the south end of the project because of the supply that we have for the Pablo Reservoir from this pumping plant that has been recently completed.

The Court: What is the basis on which the cost of construction is figured?

The Witness: The cost of construction of course consists of all of the various items that go into the service and construction of the plant.

The Court: I understand that, about the completion of the operating plant, but how is the cost divided?

The Witness: The cost is divided equally over the entire Mission Valley Division and the Camas Division also.

The Court: And what is the basis on which the charge [287] against each water user is made?

The Witness: The irrigable acreage on each unit is the basis of the charge.

(Testimony of Guy L. Sperry.)

The Court: In other words the charge is based on the irrigable acreage?

The Witness: That's right.

The Court: Whether it is actually cultivated or not?

The Witness: That's right.

The Court: Well now as I recall your testimony you say in certain cases a man will be given, we will say, three acre feet of water, on all of his irrigable land, and another man is paying the same cost?

The Witness: That's right.

The Court: But only gets one acre foot of water?

The Witness: One and a half, probably; the most gravelly soils have been tentatively permitted to get twice the amount of water delivered to the tighter soils, on the assumption that it is necessary to have more water for this land than for the tighter soil.

The Court: And how does that operate on the operation and maintenance costs?

The Witness: The operation and maintenance cost is the same; there is no discrimination in the operation.

The Court: Well that is what I had in mind, whether there is or is not; whether a man gets an acre foot or three acre feet, he pays the same operation and maintenance charge for an equal number of acres?

(Testimony of Guy L. Sperry.)

The Witness: That's right.

The Court: Then as a matter of practice you are trying to supply the deficiencies of nature, are you?

[288]

The Witness: That's what it amounts to.

The Court: It amounts to just this—you are trying to give each man an equal quantity, regardless of the natural value of the land?

The Witness: The extreme cases, however, are double allotments—that is——

The Court: The point I am getting at is this—if they are having the same number of irrigable acres and they pay the same cost of construction and the same cost of operation and maintenance, then the one who will require a greater supply of water gets his water without paying anything for it?

The Witness: Yes.

The Court: And why is that discrimination—how did it originate?

The Witness: The discrimination of this basis is, I would say, more or less local to the project; it has no particular official standing as regards other projects, and it is subject to revision in the future if it is determined that it should be revised.

The Court: What I am trying to get at is this—what right have you—under what authority is there an unequal distribution of water; what is the basis for that discrimination, as I call it—that may not

(Testimony of Guy L. Sperry.)

be the proper word—but one gets more or less than the other for the same?

The Witness: Well the basis for the discrimination—the only basis for the discrimination is the need of the land.

The Court: In other words—getting back, we can use the same phrase—you are trying to equalize the deficiencies of nature? [289]

The Witness: That's right.

The Court: You think that each farmer, with a certain number of acres, should have the same amount of water, as I see it, and then you say that one farmer needs more water to irrigate his crop than another farmer, so you charge them an equal amount, under this operation and maintenance and the costs of construction, and you give this man, we will say, just in round figures, twice as much water as the other gets, for the same amount of money; is that the general policy on the reservation?

The Witness: That has been the practice on the project for some time; however, I might say that there is considerable dissatisfaction over the system.

The Court: I can imagine there would be. Any further cross?

Recross Examination

By Mr. Simmons:

Q. What I want to ask is in regard to this double

(Testimony of Guy L. Sperry.)

duty proposition; wasn't that plan originally put in effect at Moiese, in the Moiese District?

A. I think the Moiese District was probably where it originated, for the reason that the Moiese Valley lies below the Crow Creek Reservoir, and all the valley is very gravelly; the soil in general is very porous, and that water that is impounded in *Creek Creek* Reservoir is not available for *use* any other point on the project, and that in so far as there is water in the Crow Creek Reservoir there is no reason for not delivering to the land——

Q. ——Well in other words you did have a lot of surplus water there, didn't you, that couldn't be used on any other [290] land? A. We did.

Q. And this double duty originally was a temporary operation and started originally under which you now——

A. ——It is a temporary affair that has no—it has official knowledge—but no official standing, as a definite permanent policy.

Q. It is merely applied to the Flathead Project and not to other projects in the northwest?

A. So far as I know, yes.

The Court: Well now that is an exceptional case; I gathered from your testimony that the situation is general; in other words, you made no difference in charges, because of location, with reference to the water supply?

The Witness: That has grown out of this case

(Testimony of Guy L. Sperry.)

to be the general present policy on the reservation.

The Court: In other words there is a unique condition, requiring peculiar handling, and so that they have made it a general rule covering the entire conditions?

The Witness: Yes.

The Court: Well now Mr. Sperry, from your testimony given in response to the Court's questions, that is the general policy in all divisions of the Flathead System now?

The Witness: That's right.

Redirect Examination

By Mr. Smith:

Q. As a matter of actual practice, Mr. Sperry, the situation is not—or that policy does not have a great deal of application to some of the divisions, is that not correct?

The Court: Well we are dwelling right now with one [291] division, as I understand it, but the question was that it applies generally throughout the entire project.

A. It would affect approximately half of the lands in the Mission District; very little of the lands in the Post Division, and possibly 20 percent of the land in the Pablo Division.

Recross Examination

By Mr. Simmons:

Q. In other words to this double duty land you deliver twice the amount of water you have avail-

(Testimony of Guy L. Sperry.)

able, normal flow and storage flow, during the irrigation season?

A. Not always twice the amount, possibly half—possibly twice as much—not in excess of twice the amount.

Q. Well if you have one acre foot you deliver one and a half or two acre feet?

A. Two acre feet may be delivered,—usually one and a half may be delivered if they are,—if the land is deemed to be somewhat between the extremes.

Q. You have no set rule; you deliver between one and two and never over two?

A. Yes, never more than twice the amount the tighter lands are receiving.

Recross Examination

By Mr. Wallace:

Q. Isn't it a fact that in so far as the Moiese Division is concerned you deliver sometimes down there as much as two and three times as much water as you do anywhere else?

A. We have, with the water available there that couldn't be delivered any place else, we have delivered several times the amount of water, but in the Mission Valley not—

Q. —Tell us what is the greatest amount of water or [292] acre feet of water of the acre feet you delivered in Moiese—what is the maximum amount?

(Testimony of Guy L. Sperry.)

A. I wouldn't be able to testify because I don't know; we delivered possibly four or five acre feet in some cases; I couldn't say what the amount was, maybe more than that.

Q. Isn't it about 7.34?

A. I wouldn't say; it is possible it may have been.

Q. It might have been as high as that?

A. It is extremely gravelly soil in the Moiese.

The Court: Well the record here, as I understand it, is that is water that would not be available for any other land?

The Witness: That's right.

Recross Examination

By Mr. Simmons:

Q. And the source of supply is entirely different than in the Mission Valley?

A. No in the Moiese it is possible to turn water from the Mission Valley down to Moiese, but when the water gets into the Lower Crow Reservoir it is not available for any other district.

The Court: What I am interested in is this—do you draw upon the supply for the land involved in this case, to supply the lands in the Moiese District?

The Witness: We draw upon the Mission Valley for water to supply the Moiese District only during the repairs to our reservoir for Lower Crow Creek Reservoir, that we have.

(Testimony of Guy L. Sperry.)

The Court: Well do you draw, is that the idea?

The Witness: If there is not water in the Crow Reser- [293] voir it is necessary to draw upon the supply from the——

The Court: What I am trying to get at is—do you actually do that, draw on the supply of water from the lands involved in this action, for use in the Moiese Division?

The Witness: I believe we did to a small extent last year when this Crow Reservoir was in repair.

Redirect Examination

By Mr. Smith:

Q. Where does the water that goes to the Moiese Division come from?

A. The water that goes to Moiese comes largely from Mud Creek, Crow Creek and Spring Creek, and return flow from all the lands that drain naturally into these streams—that is when irrigation is going on in the project, any time in the summer that other lands are being irrigated there is more or less water that does get away from the irrigator and gets into the natural water courses and it finds its way into Crow, Mud or Spring creek and goes on down into the Lower Crow Reservoir.

Q. And does that water come into Crow, Spring or Mud creek in such a place that it can be picked up by any of the other project works?

A. No, it would not. That is the only place that it can go, except I will make one exception, that we

(Testimony of Guy L. Sperry.)

do have a pumping plant just west of the railroad tracks on Crow Creek, indicated right here, the place is indicated, from which we may pump water out of Crow Creek into a canal that will carry it into Nine Pipe Reservoir.

Q. And even with that pumping plant you still have more water in Crow Creek than—— [294]

A. ——Ordinarily, after pumping eight or ten thousand acre feet of water from Crow Creek it doesn't lessen the supply that—that is, it doesn't lessen the water that goes by in Crow Creek, to the extent that it doesn't fill the reservoir, and when the reservoir is filled then of course we can pump water from the creek until it is drained down into Nine Pipe Reservoir, and we save about eight or nine or ten acre feet of water annually.

Q. And is that pumping plant a recent development?

A. Well it has been in about three years, I believe.

Recross Examination

By Mr. Wallace:

Q. You have previously testified, Mr. Sperry, that you do take quite a large amount of water out of the Mission District to take north to the north end of the Mission Valley Division, have you not?

A. We take it north through the Pablo Feed Canal; I don't know whether you would say we take it out of the Mission District or not; it is diversion water from the Jocko River, largely; it is run from

(Testimony of Guy L. Sperry.)

the Mission District and our Pablo Feed Canal north.

Q. I meant to say this—out of the Mission District water shed?

A. Yes, the Mission District water shed and the Jocko water shed.

Q. And you take it out of Post Creek?

A. We run water from Post Creek north, yes.

Q. To the north end of the Mission District?

A. Yes, but that is, we run it to the north end of the Mission Division; the feed canal of course—the Pablo Feed [295] Canal running north and all of the canals that come out of Post Creek are on the north side of the creek.

Q. Yes but what I am getting at, you take the water out of Post Creek into the Pablo Feed Canal and run it up to the north end of the Mission Division? A. That's right.

Q. And to irrigate land in the north end of this division? A. Yes.

Q. And you can take water out of Spring Creek and Mud Creek and Crow Creek? A. Yes.

Q. All of which creeks are north of Post Creek?

A. Yes.

Q. To take it into the Moiese Valley?

A. We——

Q. That's what you said?

A. We do sometimes, later in—last year, since we have the Crow Creek Reservoir it is very seldom

(Testimony of Guy L. Sperry.)

we have to run water directly below the Feed Canal to drop it way down to Moiese.

Q. But you do take some waters out of those creeks down to the Moiese Valley?

A. We can and do at times.

Q. And that has been a practice for years?

A. That was always the practice until the Crow Reservoir was put in.

Q. Now then if you were to leave the waters up in the north end of the Mission Division, the waters of Post Creek and Mud Creek and Crow Creek and those other little creeks that are picked up by the Pablo Feed Canal it wouldn't be necessary for you to run as much of the waters of the Mission District [296] to the north end, would it?

A. Well Spring Creek doesn't—

Q. —Could you answer that yes or no?

A. I couldn't agree with that statement because Spring Creek doesn't run into the Pablo Feed Canal for it is below that.

Q. Well but any of the creeks north of Post Creek that do run into the Pablo Feeder Canal, if you left that water up in the north end of the division instead of taking it down to the Moiese then it wouldn't be necessary for you to divert as much water from the Mission District watershed to go up north, would it?

A. It would affect some small amount, very little, at the present time, very little.

The Court: Well answer the question.

(Testimony of Guy L. Sperry.)

A. (continued) I would say that it would not be necessary to run as much north but that the amount that we would gain by it would be comparatively small.

Redirect Examination

By Mr. Smith:

Q. What proportion of the water taken down into the Moiese Valley would be below the Pablo Feed Canal, Mr. Sperry?

A. Most of it, practically all of it, there is a small amount—you say what proportion—I would say, oh 90 percent; that is just a guess, of course.

Witness Excused. [297]

WILEY G. MOUNTJOY

was called as a witness on behalf of the Interveners, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. Your name is what, please?

A. Wiley G. Mountjoy.

Q. And what is your present occupation?

A. Watermaster in the Indian Irrigation Service.

Q. And how long have you held that position?

(Testimony of Wiley G. Mountjoy.)

A. Since 1923 I believe.

Q. And in what division of the Indian Irrigation Service are you employed?

A. The Mission Irrigation District.

Q. And where is your territory, Mr. Mountjoy, with respect to the lands covered by the Magee-Minesinger and McDonald-Deschamps ditches?

A. They are embraced within that territory.

Q. What are the boundaries of the territory covered by you?

A. The Pablo Feed Canal on the east, the Mission F Canal on the south, and Post Creek on the west—the portion right in through there has no definite boundary—I might say that it is bounded on the south by the hills between St. Ignatius and Ravalli.

Q. Are you acquainted with the Magee-Minesinger Ditch?

A. Reasonably well acquainted with it.

Q. And do you know something of the methods by which that ditch is operated by the defendants?

A. Yes.

Q. Do the defendants taking water from the Magee-Minesinger [298] Ditch ever make request of you for diversion of water into that ditch?

A. No; they would, if they made such a request of any official they would make it to Mr. Dexter.

Q. Now then do you have any knowledge of the time when the waters are to be taken into the Minesinger or into the Magee-Minesinger Ditch?

(Testimony of Wiley G. Mountjoy.)

A. No.

Q. And do you have any knowledge of when the water is to be—that has been used for irrigating lands under that ditch—is to be turned back into the stream?

A. None.

Q. Where, Mr. Mountjoy, do these two ditches tap Post Creek?

A. It is a short distance below the McDonald Lake Reservoir.

Q. And above the Pablo Feed Canal?

A. And above the Pablo Feed Canal.

Q. Does the fact that—you have no knowledge of the times when water is taken from Post Creek for the Magee-Minesinger Ditch——

The Court: It isn't in the record that there was water taken for that particular ditch; there was water taken through the ditches.

Mr. Smith: That's what I mean.

The Court: Mr. Sperry testified there was no turning of government water from the storage into that particular ditch, but there was into the McDonald-Deschamps Ditch.

Mr. Smith: That's correct.

The Court: If the fact has been assumed he knows nothing of it. [299]

Mr. Smith: What I am getting at is not the turning of government water into the ditch but the defendants turning their decreed rights into the ditch, as it affects his right to the property.

(Testimony of Wiley G. Mountjoy.)

The Court: Well if that is the purpose, all right.

Mr. Smith: Let me re-make the question.

Q. What happens, Mr. Mountjoy, in the operation of your part of the project, when water is taken from Post Creek through the Magee-Minesinger Ditch without your knowledge?

A. What happens to my ditches?

Q. Yes.

A. There is a large amount of waste water comes through; at times it is into C Canal, raising the head in there very materially, making an irregular flow in that canal.

Q. Now then when the waste water from Magee-Minesinger Ditch runs into C Canal can you make any use of that waste water?

A. We can make use of a certain portion of it, a small portion of it.

Q. And what happens to that portion of it of which you cannot make use?

A. It is carried on through to Post Creek.

Q. And what happens to it there?

A. A certain portion can be diverted by Post F; the balance of it will go on down Post Creek.

Q. And if it goes down Post Creek is it then available for other lands within the project?

A. No it isn't.

Q. Now then will you tell the Court, in your own words, why you can't take care of the waste water which comes from [300] the Magee-Minesinger Ditch?

(Testimony of Wiley G. Mountjoy.)

A. Well we never know just when it is coming; it may be a foot or two, it may be ten or twelve feet; it fills our canal sometimes very full, we have got more floods working, and so forth, and it makes the administration of that canal in the lower end rather difficult.

Q. At a time when you don't expect the waters of the Magee-Minesinger Ditch to come how do you set your ditch for its operation?

A. We carry water down Mission Creek to C Canal and throw it to the users where the farmer is low under it.

Q. Then in setting the water in Mission C Canal what do you have in mind when you make your set?

A. We have in mind to supply sufficient water for all elements on that ditch.

Q. And if water comes in which you are not expecting what use can you make of that?

A. Not very much use of it, unless we have gone back and made our arrangements clear up to the source of supply.

Q. And between the time you discover that water is coming into your Mission Canal from the Magee-Minesinger Ditch and the time that you make your arrangements, what happens to that water which is then coming in?

A. Well it is generally wasted.

Q. Does the fact that this water is taken without your knowledge of the time or place of its taking cause you some administration difficulties?

(Testimony of Wiley G. Mountjoy.)

A. It does yes.

Q. Now then Mr. Mountjoy after you get your set made to accommodate the amount of water which is coming in from the [301] Magee-Minesinger Ditch, by wasting, what happens when that water is suddenly withdrawn?

A. Well there is an inadequate or perhaps no supply in the lower end of our canals, the canals are deprived of a full head, perhaps of the entire head of water, down where they are irrigating.

Q. And does that cause inconvenience to the farmers in your system?

A. It does yes sir.

Q. Now what would you say, Mr. Mountjoy, as to whether or not the fact that the water is sometimes shut off without your knowledge of it, causes any wasting of water?

A. Well in the first place the farmer who has an inadequate head, he has been running his water over a certain run with a full head; if that head is cut in half his water will not flow further between his laterals and consequently he irrigates no additional land and that water is practically wasted.

Q. How big a head of water do you normally carry in Mission C?

A. At that point?

Q. Yes.

A. Oh I would say from two to eight feet.

Q. And how large, at times, is the discharge from the Magee-Minesinger Ditch into the Mission C at that time?

(Testimony of Wiley G. Mountjoy.)

A. It has not been measured, I would estimate perhaps 12 or a few more second feet.

Q. You have measured water, have you, in the past? A. Yes.

Q. And are you familiar with the quantities of water? A. Yes. [302]

Q. And are you reasonably able to judge, estimate, quantities of water flowing?

A. Yes I think I am.

Mr. Simmons: No cross examination.

Cross Examination

By Mr. Wallace:

Q. This water that you were speaking of, coming into C Canal, does that all come out of the Magee-Minesinger Ditch?

A. No I believe not all of it.

Q. As a matter of fact there are some springs, are there not, on the Minesinger land, or on the Gariepy land north of the Minesinger land?

A. Not on the Minesinger land.

Q. What is the land north of the Minesinger land?

A. It at present belongs to Mr. Chesnor.

Q. Well aren't there some springs on the land north of the Minesinger land?

A. No springs on the Chesnor land.

Q. Well where are those springs right in that vicinity?

A. There are some springs that rise in the dis-

(Testimony of Wiley G. Mountjoy.)

trict east of there, a small head occasionally comes through there.

Q. And those springs flow down here and are picked up in this C Canal of yours you speak of?

A. At present I believe there is only one that delivers water to C Canal; I might be mistaken about that, there might be two, but I believe there is only one.

Q. And also, Mr. Mountjoy, there is quite a large acreage of land lies east of C Canal that is irrigated?

A. There are a few farms there, there is a portion of the Chesnor farm, the larger portion of the Bert Nelson farm and [303] a very few acres of Mr. Pierce's farm.

Q. And what about the farms further up the coulee where the Magee-Minesinger Ditch runs?

A. Those don't drain in the Magee-Minesinger Ditch.

Q. So that water wouldn't necessarily be water that is diverted out of Post Creek through the Magee-Minesinger Ditch?

A. The majority of it would be.

Q. But not all of it? A. Not all.

Q. And the waste water that those farmers—or if those farmers there waste any water, then this drains down into the Magee-Minesinger Ditch and eventually into your C Canal?

A. That is true.

Q. What I am getting at, you are not trying to

(Testimony of Wiley G. Mountjoy.)

say, are you, that this 10 or 12 second feet of water that comes in the C Canal from the outside is all caused by Tom Long and Minesinger diverting water out of Post Creek, would you say?

A. I would say the great percentage of it is.

Q. Could you say all of it?

A. Not all of it.

Redirect Examination

By Mr. Smith:

Q. With respect to the springs about which Mr. Wallace has asked you, do you, in making your set, do you plan on the flow of those springs?

A. The ditch rider figures on this in a very, very minor way; the only spring which I believe at present runs there is—pertains to Mr. Nelson's water right, and he may use the water or not.

Q. Is the discharge from that spring very great, do you [304] know?

A. I would estimate it at perhaps one and a half second feet; it varies at different seasons of the year.

The Court: What is a second foot?

The Witness: A second foot in this state is 40 miner's inches.

The Court: All right, what is 40 miner's inches?

The Court: I couldn't tell you what 40 miner's inches is, I can tell you what a second foot is.

The Court: What application has it to an acre

foot; can you measure it in that way, or tell us in that way?

The Witness: One second foot flowing for 24 hours makes practically two acre feet—1.98 and some fraction over that; a second foot of water is that flow of water which will fill a cubic foot of space in one second of time.

Whereupon at 3:17 o'clock p.m. of said day recess was had for the duration of 15 minutes, at the expiration of which time the trial was resumed.

Mr. Smith: I have no further examination of this witness.

Recross Examination

By Mr. Wallace:

Q. Mr. Mountjoy you have been water master since 1922 or 1923 you say? A. Yes.

Q. And you were a ditch rider prior to that?

A. Yes.

Q. In this same—in the vicinity of the defendants' lands? A. Yes.

Q. Now this water that you speak of that rises in these [305] springs on the Pierce and Minesinger and Garipey land flows into the C Canal on Wald's land and below there?

A. Not on the Garipey land—the Gardipe land—it flows into C Canal on Erickson's, if I'm not mistaken.

Q. And how far is that south of Tom Wald's?

A. Just across the road.

Q. From the east line? A. Yes.

(Testimony of Wiley G. Mountjoy.)

Q. And during all of the time that Mr. Crow was project manager and during all of the time that Mr. Moody was project manager Mr. Wald was permitted to take that spring water out of the C Canal, where it crosses his land, and bring it down on his land, was he not?

A. I don't believe so.

Q. Well didn't you yourself permit Mr. Wald to use that water that came into the C Canal from the springs, out of the C Canal on his land?

A. For a while I believe that was permitted but not all the time.

Q. That was permitted during all of the administration of Mr. Moody wasn't it?

A. I don't believe it was; I couldn't say at what time it was denied.

Q. But it was permitted for a while?

A. It was permitted for a while, as I recall.

Q. And then he was stopped from that, from using the water out of C Canal?

A. I believe so.

Q. And of course when you refer to these users of water that has gone into the C Canal, then it isn't necessary for [306] one of them to take as much water out of Post Creek down to the Magee-Minesinger Ditch to irrigate his land?

A. I presume not.

Q. And if he were still permitted to use that spring water that goes into C Canal, on his land,

(Testimony of Wiley G. Mountjoy.)

it wouldn't flow on down the canal and be wasted, as you say it now is, would it?

A. I didn't say it was wasted when it went down the canal.

Q. I misunderstood you then.

A. I said that excess of water would be wasted when it went down the canal.

Q. And if he were permitted to use this spring water there wouldn't be any excess water would there? A. Well——

Q. ——To be wasted, would there?

A. That can hardly be answered in a yes or no manner; if he were permitted to use water when he saw fit, without any request through our office, and also permitted to turn it back into our canal when he saw fit, without notifying us, that would be waste, the same as the water from Post Creek is.

Q. But he wouldn't be turning any water back into C Canal that he had taken out on the west side of the canal at all? Land irrigated on the west side of the canal, would he?

A. He might shut the turnout off without notifying us.

Q. But I understood you to say if he had been turning water back into the canal—he wouldn't be doing that, would he?

A. If he turned the turnout that would be equivalent to turning it back into the canal.

Q. Do you know why we are in dispute and no

(Testimony of Wiley G. Mountjoy.)

longer permitted from the use of this spring water after it enters the [307] C Canal?

A. Yes because we couldn't deliver a steady flow to you below that spring.

Q. Well these spring waters still have quite an effect on the amount of water that normally flows down C Canal, would it? A. Why naturally.

Q. Well couldn't you still run water down C Canal for the farmers below?

A. We could, yes.

Q. Then I don't see that it would have any effect on it, would it? A. Why wouldn't it?

Q. I'm asking you? A. It would, yes.

The Court: Can you tell me why?

The Witness: Because, your Honor, if Mr. Wald were using water, using this spring water, we would have to turn more water down from the head of C Canal from McDonald Lake to supply the farmers below; if one of them farmers suddenly decides to use that water, turns it on down the canal, then there is an excess in the canal from that point on.

Q. Mr. Mountjoy this water that you have just been talking about does go into the Magee-Minesinger Ditch, does it?

A. This water that rises on the Garipey land?

Q. Pierce and Minesinger and Garipey land?

A. No I believe not.

Q. So whether——

(Testimony of Wiley G. Mountjoy.)

A. —All of it that rises on Minesinger's would reach the end of the Magee-Minesinger land—or Mr. Wald's farm [308] laterals before it reaches C Canal, or most of it would.

Q. Well whether Mr. Wald uses any of that spring water or not you still have it to contend with in your C Canal? A. Yes.

Q. And so whether or not he has, in the Magee-Minesinger Ditch, or whether or not he uses any water out of the Magee-Minesinger Ditch, you still have to contend with this spring water, don't you?

A. Yes.

Redirect Examination

By Mr. Smith:

Q. Mr. Mountjoy is the spring water the only water which you have to contend with in the Mission Creek Canal under the present system of operations in the Magee-Minesinger Ditch?

A. No it is not.

Q. And is it a big proportion of the water you have to contend with?

A. It is a small proportion.

Recross Examination

By Mr. Wallace:

Q. The waste water from Mr. Wald's irrigation, on the land east of the ditch, that goes into the C Canal, if he were permitted he could still take that out and use it on the land—his land, west of the canal, couldn't he? A. He could yes.

(Testimony of Wiley G. Mountjoy.)

Q. But he is not permitted to do so now?

A. No.

Q. And has not been permitted since Mr. Gerharz and Mr. Sperry have been project managers?

A. I believe previous to that. [309]

Q. But under the administrations of Mr. Moody and Mr. Crow he was permitted to retake and re-use that waste water?

A. Not under all of the administration of Mr. Moody, if I recall correctly.

Q. But some of the time?

A. Some of the time.

Witness Excused.

C. H. DEXTER

was called as a witness on behalf of the interveners and having been heretofore duly sworn testified as follows:

Direct Examination

By Mr. Smith:

Q. You are the same Mr. Dexter who has heretofore testified in this case? A. Yes sir.

Q. And you are the watermaster on the Post Division of the Flathead Irrigation Project?

A. Yes sir.

Q. And I think you outlined the boundaries of that division previously; are the lands of the de-

(Testimony of C. H. Dexter.)

defendants, lying under the Magee-Minesinger—and the ditches—within your division? A. No sir.

Q. In the supervision of your portion of the division do you take care of the waters of Post Creek? A. I do.

Q. And from what place to what place do you have your jurisdiction over it?

A. From Post Creek where it comes out of McDonald Lake to [310] the head of Post F Canal.

Q. Where do the defendants take their water out of Post Creek?

A. Just below McDonald Lake.

Q. And from what canal do you irrigate the lands in your division, Mr. Dexter?

A. Well we operate through the Pablo Feed Canal, the Kicking Horse Feed Canal and Post F.

Q. Now then does the taking of water out of Post Creek into the McDonald-Deschamps and the Magee-Minesinger ditches affect the amounts of water flowing in your ditches which you use to irrigate your lands? A. It does.

Q. And in what manner does it do that?

A. Well we have the ditch set, and without any notice the heads are increased in Wald's ditch or the Magee-Minesinger Ditch or the McDonald Deschamps Ditch, and we are short; and if we go up and get the creek raised up to where we are not short, and then finish resetting, and without any notice they shut the water off, then we have a surplus going down Post Creek which is wasted.

(Testimony of C. H. Dexter.)

Q. Now then assuming water is turned into each of the ditches which we have mentioned, that is, the Magee-Minesinger or the McDonald-Deschamps, and the water becomes short in the canal with which you are irrigating the lands in your division, where do you go to get your additional supply?

A. McDonald Lake.

Q. In the actual operation of the project, Mr. Dexter, do these defendants having lands under the Magee-Minesinger and McDonald-Deschamps ditches ever advise you when they are going [311] to take water into their ditches or when they are going to shut the water off? A. They do not.

Q. What happens to the farmers, and your farmers, when amounts of water are suddenly and without your knowledge taken into these private ditches?

A. Well down on Post F when the water gets low in there why I generally have a delegation of farmers up to see me about it, why it got low, because it shuts off their irrigation and if they are irrigating with a head of water and it slacks off why they are just out, and the next day the ditch rider must come around and increase their head.

Q. How long does it take when you are interviewing the farmers on Post F in an effort to make arrangements to take care of them?

A. About 24 hours to get the water from Mission Creek to F Canal again.

(Testimony of C. H. Dexter.)

Q. During that period of 24 hours is there any wastage of the water which other farmers are actually receiving?

A. Well there is a waste in this way; if a man is irrigating and his head goes down and he doesn't cover the land he anticipates he will cover between runs, then when he gets the later increase he has got to go over that same land.

Q. Now then after the water is taken out into the Magee-Minesinger and McDonald-Deschamps ditches, you make a new set, do you not, from McDonald Lake? A. Yes.

Q. After that set is made and the water is shut off in the McDonald-Deschamps Ditch and the Magee-Minesinger Ditch, or either of them, then what happens to your distribution system? [312]

A. Well it is usually wasted down Post Creek unless we get up and shut it down and reset it again.

Q. And after you discover these ditches have been turned back into Post Creek how long does it take to make your reset?

A. Oh about 12 hours.

Q. And during——

A. ——It all depends on when you happen to catch it.

Q. And during that 12 hour period can you make any use of the excess water which is then going down? A. No.

(Testimony of C. H. Dexter.)

Q. As watermaster of this division have you ever made any attempt to regulate the amounts of water flowing in the McDonald-Deschamps and the Magee-Minesinger ditches?

A. Prior to 1935, under Mr. Moody's jurisdiction we did, yes.

Q. And what did you do in that respect, that is, physically, with respect to trying to regulate the amounts of water?

A. Well during that period when there were no controls in the ditches below McDonald Lake, and we occasionally built dams across, put a dam in across the outlet of the ditch to cut down the water.

Q. And did you do that with both of those ditches? A. Yes.

Q. And after you put your dam in then what happened?

A. Why the next time I went up why the dam was out.

Q. Do you know who took it out?

A. No I don't.

Q. And did that happen on one occasion or more than one occasion? [313]

A. Well lots of occasions.

Q. You just had a stone-throwing contest?

A. Threw just about all of the rocks out in the bottom of Post Creek up there.

Mr. Simmons: No cross examination.

(Testimony of C. H. Dexter.)

Cross Examination

By Mr. Wallace:

Q. Generally speaking has there always been a shortage of water among the farmers who are to receive the water from the three canals over which you have jurisdiction? A. Yes.

Q. Now you say these farmers, defendants in this case, have used the Magee-Minesinger and the McDonald Deschamps ditches, turned the water in and shut it off, without any notice to you?

A. Yes sir.

Q. Does that happen quite frequently?

A. Well every time they make a change.

Q. Do they make a change quite frequently?

A. Sometimes; sometimes it runs steady for a long time.

Q. And then when they get through irrigating they shut the ditches down, do they? A. Yes.

Q. Sir? A. Yes.

Q. Now they have never—has any of these defendants ever refused to tell you when they were going to irrigate or when they were going to shut the water down?

A. Well the defendants are all a long ways from my division and I never happen to see them. [314]

Q. Now then if you will answer my question please, Mr. Dexter?

A. I didn't get your question.

Q. I asked you if any of the defendants in this

(Testimony of C. H. Dexter.)

case have ever refused to tell you when they were going to turn water into those ditches or when they were going to shut the water down in their two ditches? A. No.

Q. You rather expected them or wanted them to come and notify you or some of your ditch riders?

A. That's the plan we operate under.

Q. But you have no reason to believe that if they were asked, that these defendants would not tell you when they were going to irrigate and when they were going to shut the water down, have you?

A. No.

Q. Well Mr. Dexter, if by reason of these operations there has been an excess of water going down the canal over which you have supervision, what is to prevent you from giving it to some farmer and letting him irrigate with it, rather than to waste it and send it on down the creek?

A. Well if we knew it was going to continue we would try to use it but we don't know how long it will continue.

Q. Some of these farmers could make use of this excess water couldn't they?

A. They do unless it is shut off on them.

Q. And if there is excess water and the farmer uses it then it isn't wasted is it?

A. Well not in one sense of the word, no.

(Testimony of C. H. Dexter.)

Redirect Examination

By Mr. Smith: [315]

Q. Can a farmer get ready to irrigate—take water—on just a few minutes notice, so that he can do his irrigating?

A. We require 24 hours notice for delivery of water.

Q. What I mean is this—if you find that you have more water in Post Creek than you need for the farmer who plans to need the irrigation, and you went to one of them, on very short notice, could he get ready to make his set, get his land and men ready to immediately irrigate with this water?

A. Well if he is right short of water he might, but I don't know how that would work out—I never tried that.

Q. In such an event would it involve going around and seeing all the farmers on the ditch to find out which of them could possibly use water?

A. It would.

Recross Examination

By Mr. Wallace:

Q. You have a ditch rider on the ditch all the time, don't you?

A. Yes sir.

Witness Excused.

DENNIS A. DELLWO,

one of the interveners, was called as a witness on behalf of the interveners, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Smith:

Q. Your name is Dennis A. Dellwo?

A. Yes sir.

Q. And you are one of the *defendants* in this law suit? [316]

A. Yes sir.

Q. One of the interveners, I mean?

A. That's it.

Q. And are you the owner of a tract of land described as the E $\frac{1}{2}$ SW $\frac{1}{4}$ Section 26, Township 20 North, Range 21 West?

A. Yes I am.

Q. And is this tract of land marked on the map in red, close to the name D. A. Dellwo, your tract of land?

A. That's right.

Q. Do you hold any official position with the Flathead Irrigation District?

A. I am commissioner of the district; I am secretary of the board of commissioners.

Q. And how long have you held those positions?

A. Since the district was created.

Q. And when was that?

A. In 1927.

Q. And prior to 1927 did you have experience with irrigation and under the Flathead Irrigation Project?

A. Yes, I received the first water that came from the ditch under which my land is served.

(Testimony of Dennis A. Dellwo.)

Q. And about when was that?

A. In 1918 I'm sure.

Q. And how long have you been on the Flathead Indian Reservation as a land owner?

A. I homesteaded there in 1910; I have been there practically ever since; we were gone for a year or so.

Q. During the years from 1935 to 1939 inclusive have you farmed the land which we have mentioned and which is marked on that map in red? [317]

A. Yes sir.

Q. And during that period of time have you requested from the Flathead Irrigation Project all of the water which you could get from the project?

A. I am quite sure that we have—of course we might have a small residue left, of our allowance—during most of the year I am sure we did, yes.

Q. And could you, in the years from 1935 to 1939 inclusive, have used more water to beneficial advantage on that particular piece of land?

A. Oh yes, during those years we, in common with all the rest of the farmers under that division, and I think likely under the whole project, practiced dry land farming on a part of our farms in order that we might conserve our allowance of the water on a smaller part of our farms and save at least a part of the crops on our lands.

Q. Having reference particularly to the year 1935, do you recall whether or not there was a water shortage in that year?

(Testimony of Dennis A. Dellwo.)

A. Yes there was quite a terrific water shortage that year.

Q. What did that water shortage do, if anything, in the way of crop damage?

A. Practically all of the new seeding that year was destroyed by drought; many of the farmers were out of water in the early part of August and the latter part of July and their pastures dried up, their hay made about a half a crop, their alfalfa went into the winter quarter dry, and consequently made a short crop the following year; their sugar beets made a light tonnage; in fact I heard frequent complaints of farmers that their beets when they dug them were loose in the ground because they had really shrunken [318] in size during the dry months previous to digging time.

Q. Do you know of your own knowledge, apart from what anybody told you, that during the year 1935 there was an acute shortage of water?

A. Yes indeed.

Q. And that there was actual crop damage resulting from it?

A. Yes indeed there was.

Q. Now during the years subsequent to 1935 what would you say as to whether or not you, and others of your neighbors, could have used a greater quantity of water to a beneficial advantage?

A. During all of those years they could have; the allowance of water by the project, to my division, ran from about .90 to about 1.15 of an acre

(Testimony of Dennis A. Dellwo.)

foot of water per acre, and that is not sufficient to produce maximum crops on our land.

Q. And what is the result of that shortened allowance, generally?

A. The result is that as a farmer sees that he is going to lose part of his crop he abandons part of his area and doesn't water it at all and takes the loss there, with the hope of maturing his crops on the balance of his farm.

Q. Would—in a year like 1935, or any other dry year, would 500 or 1000 acre feet of water make any appreciable difference to the farmers in your area?

A. Yes it would make a very appreciable difference. If I might illustrate—the fact that the Crow Pumping Plant was completed in the latter part of August—our gravity supply had been exhausted—we had expected to pump probably a thousand acre feet of water that fall in time to be of some use—and the question arose on the part of the project management [319] whether they should distribute that water or put it in storage for the following year, and of course I was asked for my opinion on that question, and I told the project management that if he attempted to store a thousand acre feet of water, with our crops burning up, that there would be a mob up after him before very long; a thousand acre feet of water meant that the sugar beets could be completed, that the pasture could be restored, that new seedings could be saved, and on a large

(Testimony of Dennis A. Dellwo.)

area of land a thousand acre feet of water to finish up the season can be spread over four or five hundred acres.

Q. Now having in mind your experience as a commissioner of the Flathead Irrigation Project, or District, and also your acquaintance with the land owners in the project, and your own experience as a farmer on the project, what is your opinion as to whether or not it would be possible for you or any group of your neighbors located on the lands in your location, to build a system of diversions to irrigate those lands without help from parties lying closer to the sources of supply?

A. It would be absolutely out of the question; that is illustrated very forcefully by the fact that we have had to appeal to the United States for relief from construction charges, as it is, under the very reasonable rates that the United States granted to our project, notwithstanding the fact that we have no interest to pay on the construction charges at all, we still have had to appeal to the United States for relief from construction charges.

Q. And that is true, is it not, even though you who live some considerable distance from the immediate source of supply are helped in the payment of your construction and [320] operation and maintenance charges by those lying immediate to the source of supply?

A. That is right for anyone as far from the

(Testimony of Dennis A. Dellwo.)

source as my land is, even if a large number of us band together it would be economically impossible for us to collect the waters in the mountains and bring them to our lands and expect to make any reasonable return from our lands.

Q. Your land is a former Indian allotment, isn't it? A. Yes.

Q. And your land receives only the so-called single allowance of water? A. That's right.

Q. Do you have any knowledge of the administration of the project by the project officials of the Flathead Irrigation Project?

A. Yes the project—the management is in frequent consultation with our board of commissioners on matters of policy, and in my position as secretary of the Flathead District I manage to and make it a point to keep myself informed.

Q. Now then having in mind your experience in that connection, your experience as a land owner, what would you say as to whether or not any group or groups of private civilians could possibly handle the administrative problems involved in carrying the waters of the Mission Division to the lands in that division?

A. It would create a state of high confusion, for the reason that the waters supplying that country originate from such a wide source; for instance, our system now reaches over beyond the natural watershed of the Mission Valley, and the head waters of

(Testimony of Dennis A. Dellwo.)

the Blackfoot River on the [321] east; they reach clear over into the Little Thompson watershed on the west; clear up into the Little Bitter Root lakes on the northwest, and with the attempt apparently to divert every available supply of gravity water to that storage, and it would be extremely difficult for the farmers to ever organize themselves to do that, and if they should organize * * *

Q. * * * Once organized could two or more groups possibly, in your opinion, handle the administration details?

A. They would have to have some consolidated or central body, they would simply have to have that, because there would have to be someone in authority to allocate the waters, those several waters, to those many, many tracts of land.

Q. As an individual farmer, Mr. Dellwo, are you required, in taking your water from the project system, to know, in the absence of the advice given you by the project, when you have used, or approximately used, your proportionate share of the water?

A. If I am advised in advance what my proportionate share is going to be, and keep track of my deliveries, I can tell of course very closely, but I don't believe the ditch riders make that a matter of daily record in their reports of measuring water so I get them to report, of course from my ditch riders—once a month in regular order.

Q. What I am getting at is this—if you were operating your land without any central irrigation

(Testimony of Dennis A. Dellwo.)

system could you know—would you have any way of knowing what your proportionate share would be?

A. No—you mean, would I have any way of knowing what my share of all that water would be?

[322]

Q. Even for water necessary?

A. No I wouldn't have any way of knowing that.

Q. Now then as I understand it there was some testimony about the levy against the land owners in the Flathead District and the Mission Valley District, is that true?

A. I was under the impression there was not any difference but the project manager tells me that sometimes there is some slight difference in the—we have two different levies—now we must understand one another—the effect of those two different kinds of levies—the United States levies the district and the district in turn levies the land holders; now I have been under the impression the levy made by the United States against the lands in the entire Mission Valley were equal or approximately equal to the levy made by the district against the land; if the two districts are not equal that is a matter of district management, probably a matter of government or project policy, the difference in these levies.

Q. The administration levy you make goes to the district, does it, for the payment of its officers as salaries and supplies?

A. That's right; and the operation and mainte-

(Testimony of Dennis A. Dellwo.)

nance levy goes to pay the operation and maintenance levy which the government has levied against the district as a corporation.

Q. And do you know as a matter of fact whether there is any considerable difference in the administration levy?

A. Yes there has been a very large difference; the Flathead District is a large district, and the cost per acre for administration has been very, very much less than the levies on the other irrigation districts. [323]

Mr. Simmons; No cross examination.

Cross Examination

By Mr. Wallace:

Q. Did I understand you to say that the levies made by the United States of the two districts are the same?

A. I don't know what you understood me to say; I said that I had been assuming they were the same or approximately the same, but I have been advised by the project manager today that there is sometimes some small difference.

Q. For instance, last year did the Flathead Irrigation District levy an assessment for pumping charges? A. The Flathead Irrigation District?

Q. Yes.

A. You mean the district levied against the land owners?

(Testimony of Dennis A. Dellwo.)

Q. Yes. A. Yes we did.

Q. And did the Mission Irrigation District?

A. I suppose they did.

Q. You don't know. You have spoken of the waters of the Little Bitter Root and the Thompson River?

A. Yes.

Q. None of those waters are used in the Mission Valley?

A. No.

Q. That is over on the Camas?

A. On the Camas division of the project.

Q. And you have no reason, have you, to believe that there will ever be an abundance of water—by that I mean a sufficient amount of water, to properly irrigate all of the lands that the Reclamation Service, or the service contemplates putting under water?

[324]

A. Well that is a far question and the answer to it might be, if anything at all, very far indeed, that question and my answer; if the people of the Flathead Project ever have plenty of water it will be about the worst thing for the project that ever happened; I think when the people of the project have enough water so that they will make occasional use of it, then they are well off, but to give a man enough water so that he says he has plenty, I don't think the project has been built yet that can do that.

Q. All right I will change the question—given the occasional amount of water required—do you

(Testimony of Dennis A. Dellwo.)

have reason to believe that they will ever have enough to advantage?

A. Yes, a lot of reason.

Q. There is a study being made by the Walker Commission, is there not, for the purpose of decreasing the area of this project?

A. No not for that purpose.

Q. It is one of the purposes?

A. The study made by Mr. Walker is being made for the purpose of considering a method of replacement of construction that can be met by the farmers in the project, and he has suggested that possibly some sizeable area of less productive lands, it might be advisable to drop from the project.

Q. Were you present at a conference one day this winter in the city of Missoula when Mr. Walker, Director of the Indian Irrigation Service, was here from Washington, at which time he discussed this matter with us?

A. Yes.

Q. And didn't he at that time tell us that that was one of the very purposes of the Walker Commission? [325]

A. Not the very purpose.

Q. I said one of the purposes of the Walker Commission was to make an investigation and study of the Flathead Project, and one of the purposes was to find out how much they should reduce the area—or the contemplated area I should say—of the Flathead Project, to the end that there might be a sufficient amount of water——

(Testimony of Dennis A. Dellwo.)

A. —He might have said that—I wouldn't say whether he did or not—but it would be a matter of conversation only, as he was endeavoring to make a purely economic study, and if he suggested that to us—and we didn't agree with him sometimes.

Q. I hadn't quite finished when you answered—and he did tell us that, though, didn't he?

A. Now I told you I wouldn't say whether he told us or not, but he might have, in the course of a general conversation, he might have said that and many other things.

Q. And you really believe that that is what is being done by the Walker Commission and that the Walker Commission will recommend——

A. —I really believe that he was considering that question—not that he was going to recommend anything.

Q. You really believe, don't you, that the Walker Commission is going to recommend that a lot of this so-called pasture free land that is not now being irrigated could be eliminated from this project so there may be a sufficient amount of water available both by natural flow and storage and pumping, for the balance of the land irrigable in the project?

A. You ask me if I believe that, or he said that?

Q. I asked you if you believe he is going to recommend that? [326]

A. Oh I couldn't say what he is going to recommend. That idea has been discussed on this——

(Testimony of Dennis A. Dellwo.)

The Court: Mr. Dellwo wants to talk so we will let him talk.

A. (continued) That idea has been discussed, your Honor, with the thought in mind not only of eliminating undesirable land and non-productive land and lands which the people who own them don't want in the project, but with the further idea that there might be other lands not now in the project which it is desirable to irrigate, which could be brought in to take their place.

Q. Well practically all the Class 1 and Class 2 lands are now in the project, aren't they?

A. No; it is my opinion that there will be applications from people to come into the project that will probably cover 20 thousand more acres of land in the Mission Valley; we have them all the time.

Q. Where is that land?

A. Along the foot of the mountains east of the Mission Valley clear up above Finley Point; for instance we have people before our board every little while wondering why they can't get in and get their land irrigated.

Q. A large proportion of that land you are talking about now is now being irrigated by these so-called private Secretarial rights?

A. No, none of those, who are asking to get in; we haven't had any holders of private rights asking to get in.

Q. I believe that, all right.

A. They have free use of water in there.

(Testimony of Dennis A. Dellwo.)

Q. I see. But this 20 thousand acres you are speaking of along east of the Mission Range—or west of the Mission Range [327] on the east side—is now land that is being irrigated——

A. ——I don't like to re-shape your question, but you are speaking of lands that have a private water right, and not the lands I am speaking of now—I am speaking of other lands that don't have.

Witness Excused.

Mr. Smith: I now offer in evidence Exhibit 13 and Exhibit 20; Exhibit 13 being excerpt from the Report of the Commissioner of Indian Affairs, 1907, Volume 2, page 52; and Exhibit 20 being excerpt from the Seventh Annual Report of the Reclamation Service, 1908, pages 100 and 101. These exhibits have both been given to counsel, with the volumes from which they were taken, and as I understand it counsel have no objection.

Mr. Simmons: No objection.

Mr. Wallace: No objection.

The Court: These exhibits will be admitted.

Interveners Exhibit 13 and Interveners Exhibit 20, being the instruments so referred to, were thereupon received in evidence without objection, identified as such exhibits, and the said exhibits are on file with and form a part of the original exhibits in this case.

INTERVENERS' EXHIBIT 13

EXCERPT FROM REPORT OF THE COM-
MISSIONER OF INDIAN AFFAIRS, 1907,
VOL. 2. Page 52.

Flathead—On April 26, 1907, the Director of the Reclamation Service was asked to make a preliminary investigation on the Flathead Reservation in Montana to enable me to recommend the legislation needed for an adequate system of irrigation for the Indians to be allotted and for the lands to be disposed of under act of April 23, 1904 (33 Stat. L., 302). No report has yet been received from him.

INTERVENERS' EXHIBIT 20

EXCERPT FROM SEVENTH ANNUAL RE-
PORT OF RECLAMATION SERVICE, 1908

Pages 100-101

FLATHEAD PROJECT (INDIAN SERVICE)

General Statement

The principal data relating to the Flathead project are summarized as follows:

Counties: Flathead, Sanders, and Missoula.

Townships: 15 to 24 N., Rs. 18 to 25 W.

Irrigable area: 130,000 acres. Ownership, Indian lands.

Average elevation of irrigable area: 2,800 feet above sea level.

Range of temperature on irrigable area: Maximum, 100° ; Minimum, -20° .

Character of soil of irrigable area: Clay, forest loam, and gravelly loam.

Principal products: Alfalfa, grain, vegetables, apples, and small fruits.

Railroad stations: Evaro, Arlee, Ravalli, Dixon, and Perma, Montana.

Railroad: Northern Pacific.

Principal markets: Local mining and lumber camps.

The irrigation plan of the Flathead project will provide for the irrigation of about 130,000 acres in various parts of the Flathead Indian Reservation. Water will be taken by simple diversion works from the Jocko River and several creeks rising in the Mission Mountains, the late summer flow being supplemented by storage in several reservoirs, of which Lakes St. Mary and McDonald will form two, and by pumping from the Pend Oreille River. The falls of the Pend Oreille River afford opportunity to develop much more power than is necessary to irrigate the arable land within reach. Studies [539] are being undertaken to learn the amount of and best method of utilizing this power. The fall is about 240 feet in 6 miles, and the minimum natural flow last winter was 2,500 second feet, but the average flow is much larger.

Authorization

By an act of the Sixtieth Congress, first session (Public No. 104), an appropriation of \$50,000 for preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the act of April 23, 1904, and entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and to begin the construction of the same. The cost of the entire work is being reimbursed from the proceeds of the sale of the land within the reservation.

Surveys

Reconnaissance surveys were begun in 1907, and in June, 1908, two parties began work, one in Jocko River Valley, where about 11,000 acres of land may easily be reached from the Jocko River, and the other in the Mission Creek Valley, where there are about 20,000 acres of arable land. Work is being pushed on these tracts where the problems of construction are the simplest, and it is expected to have portions of each of the areas ready for construction of canal systems in the spring of 1909. Work is also being done in determining the available water in the smaller streams and the lands that may be

covered. Allotments have been made to the Indians in many widely separated parts of the reservation, and many small irrigation plants will be required to reach all lands that are susceptible of irrigation.

[540]

Mr. Smith: The Interveners rest, your Honor.

The Court: Open for the defendants.

And thereupon the following evidence was introduced by the defendants upon behalf of their case in chief: [328]

RAY BIGGERSTAFF

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. State your name? A. Lee Biggerstaff.

Q. And you live on the former Flathead Indian Reservation? A. I do.

Q. How long have you lived up there?

A. Since March 1, 1912.

Q. Did you homestead on this reservation?

A. Yes sir.

Q. And what year?

A. I filed on my homestead the 17 of November 1911.

Q. Do you have any connection with the Mission Irrigation District?

(Testimony of Ray Biggerstaff.)

A. I am secretary of the Mission Irrigation District.

Q. And how long have you been secretary of that district?

A. Since the third Saturday in April, 1926.

Q. That's the day the district was formed, or created?

A. I beg pardon—I think I should have said 1927.

Q. You have been secretary since it was created?

A. No there was a short period in there that there was another secretary, between August, 1926, and the third Saturday in April following.

Mr. Wallace: May it please the Court we desire to offer in evidence at this time the defendants' proposed exhibit 12, which was identified this morning by the witness Hanna, and which is a Report by the Committee appointed to [329] ascertain the amounts of the private water rights, on April 23, 1907, to which is attached a further finding of the committee with reference to the Oro Deschamps allotment.

Mr. Simmons: To which the plaintiff objects on the ground that it is incompetent and immaterial, has no bearing on any of the issues in this case. This certified copy represents a grant by the Secretary of the Interior to the lands of one of the defendants in this case for the waters of June Creek and not Post Creek: the waters of June Creek

(Testimony of Ray Biggerstaff.)

are not involved in the case; and in the plaintiff's complaint we have pleaded and recognized the so-called Secretarial rights to the lands of the defendant Bert Lish, which were formerly designated as the Oro Deschamps allotment, this is an endorsement of the grant made in 1927 but not to the waters of Post Creek, but June Creek; June Creek is a tributary of Post Creek but flows into Post Creek below the point of diversion of the defendant.

The Court: Overruled.

Defendants' Exhibit 12, the instrument referred to, is on file with the original exhibits in this case.

DEFENDANTS' EXHIBIT 12

Flathead Agency

Dixon, Montana

April 23, 1927

Commissioner of Indian Affairs,

Washington, D. C.

Sir:

The Commissioner of Indian Affairs under date of August 4, 1925, recommended the appointment of a Commission consisting of the Superintendent of the Flathead Agency, the Project Engineer of the Flathead Project and a disinterested member of the Flathead tribe, for the purpose of investigating claims for private water rights on the Flathead

(Testimony of Ray Biggerstaff.)

reservation. The recommendation was approved by the First Assistant Secretary on August 7, 1925.

Mr. Alphonse Clairmont, who was a member of the original Water Right Commission was selected as the third member of the Commission.

This Commission made field examinations of all lands on which applications for private water rights have been made. Public hearings were held for the purpose of taking testimony covering the various rights claimed.

The original Commission, whose report was approved by the Department on November 25, 1921, used as the basis of their findings:

“Beneficial use prior to the appropriation by the United States shall be the basis, the measure, and the limit of the right to the use of these waters at all times irrespective of the carrying capacity of the ditch and not exceeding for irrigation, a limit of two acre feet per annum at the point of diversion; that the right to the use of water for irrigation shall be inseparably appurtenant to the land, and no right for the use of water for irrigation can be acquired independent of its use upon and attached to [531] definite tracts of land, and that water rights cannot be detached from the land, place, or purpose for which they were acquired without the loss of priority.”

(Testimony of Ray Biggerstaff.)

It is believed to be a just and correct measure of private water rights, and having already recieved Departmental approval, is made the basis for the findings in the cases covered by this report.

It is recommended that the findings in the nineteen (19) cases covered by this report be approved.

Respectfully submitted,

(SGD) CHARLES E. COE

Superintendent Flathead Reservation.

(SGD) C. J. MOODY

Project Engineer Flathead Project.

(SGD) ALPHONSE CLAIRMONT

Member Flathead Tribe.

Allot. No. 734, Name Oro Deschamps
W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W.,
Sec. T. N., R. W.

The Committee, on March 19, 1926, made an examination in the field of the irrigation system and water rights appurtenant of the lands of Bert Lish being allotment No. 734, comprising the W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., and Sec. , T. N., R. W., and testimony was taken on , 19 .

From personal investigation on the ground, testimony taken and from facts shown on Plat F 1402, Sheet 19 made by an engineer employee of the United States Indian Irrigation Service after a

(Testimony of Ray Biggerstaff.)

survey by transit and stadia, it is determined that the water [532] right of 4.8 acres in the NW $\frac{1}{4}$ SE $\frac{1}{4}$ and 9.3 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W., heretofore adjudicated is hereby confirmed, it is further determined that there have been irrigated an additional 26 acres from June Creek in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 17, T. 19 N., R. 19 W. from an early date and entitling said 26 acres to a water right from June Creek, that said 40.1 acres hereinbefore described are determined to have a valid and subsisting water right from Post and June Creeks to the extent of 2 acre feet per annum; that none of the remaining area of said allotment has a water right from any source. Total water right 80.2 acre feet per annum. [533]

Q. Mr. Biggerstaff I will show you defendants' proposed exhibit 21 and will ask you what that is?

A. This is a certified copy of a map number 15229, April, 1914, United States Reclamation Service, of the Flathead Project in Montana.

Mr. Wallace: We offer 21 in evidence?

Mr. Simmons: No objection.

Mr. Smith: We have no objection.

The Court: In evidence without objection. [330]

Defendants' Exhibit 21, the instrument referred to, was then received in evidence without objection and is on file with the original exhibits in this case.

NOTE: THE LOCATION OF PROPOSED CANALS SHOWN ON THIS MAP SHOULD NOT BE CONSIDERED DEFINITELY LOCATED AS THEY ARE SUBJECT TO CHANGE OR ABANDONMENT UPON FURTHER INVESTIGATION



IRRIGATION PLAN. The plans for the irrigation of the Flathead Project consist of irrigation of about 152,000 acres of land in various parts of what was formerly the Flathead Indian Reservation. The water being diverted from creeks and rivers in the Flathead National Mountains and conducted by canals directly to the land and to reservoirs for the storage of flood waters. The plan also provides for supplementing ground water by pumping from Flathead Lake. The area of the drainage basin is approximately 8,000 square miles. Irrigable area is about 152,000 acres. The project is divided into three divisions, Pablo, Pablo and Polson divisions, which contain the largest percentage of irrigable land allotted to the Indians, have been selected for the first development.

DATA FOR COMPLETE PROJECT. Length of project, 117,556 feet. Aggregate capacity, 1,949,970 acre-feet. Length of canals, 14 miles with capacity greater than 300 second-feet, 86 miles with capacity less than 300 second-feet, 800 miles with capacities less than 50 second-feet. Tunnels, Aggregate length 3,968 feet. Irrigable area, 152,000 acres.

AGRICULTURE AND CLIMATIC CONDITIONS. Length of irrigating season May 1 to Sept. 30, 153 days. Average temperature during season 53.0° F. Average rainfall on irrigable area, 15.1 inches. Range of temperature on irrigable area -30° to 90° F. Crops raised are wheat, corn, alfalfa, hay, grain, apples, vegetables, small fruits, grain, apples, vegetables, small fruits and cattle.

DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE
FLATHEAD PROJECT MAP NO. 35229
APRIL 1914

(Testimony of Ray Biggerstaff.)

Q. I will show you defendants' proposed exhibit 22 and ask you what that is?

A. Certified copy of a letter signed by F. H. Abbott, Assistant Commissioner, addressed to the Honorable Secretary of the Interior, dated May 27, 1912.

Q. Relating to what?

A. Old Ditches and Water Rights on the Flathead Reservation.

Mr. Wallace: We offer 22 in evidence.

Mr. Simmons: No objection.

Mr. Smith: No objection.

The Court: In evidence without objection.

Defendants' Exhibit 22, the instrument referred to, was received in evidence without objection and is a part of the original exhibits in this case.

DEFENDANTS' EXHIBIT 22

United States

Department of the Interior

Office of Indian Affairs

Washington

May 27, 1912.

The Honorable

The Secretary of the Interior

Sir:

There is inclosed herewith a letter from Edward Clairmont, a prominent and well to do Indian living on the Flathead Indian Reservation in Montana,

(Testimony of Ray Biggerstaff.)

concerning water rights and ditch rights by reason of ditches constructed at the expense of the allottees before the beginning of construction of the present Flathead Irrigation project, which brings up the question of what relation Indians under such ditches shall bear to the present irrigation system as to charges for construction.

The Office has given careful consideration to the subject and believes that administrative equity requires a preservation of all such rights. It is therefore respectfully recommended (1) that this Office be authorized to have an examination made by a committee which shall include the Indian Superintendent, an Engineer employed on the works, and an Indian to be selected by the Indians for the purpose of determining the lands so affected; (2) that all lands covered by ditches constructed out of private or individual funds be determined to have paid up ditch rights and not subject to construction charges under the new system.

Respectfully,

F. H. ABBOTT

Assistant Commissioner.

Approved:

First Assistant Secretary.

(WCP) [542]

(Testimony of Ray Biggerstaff.)

June 3, 1912.

Commissioner Abbott:

The First Assistant Secretary directs me to return herewith the papers regarding old ditches and water rights on the Flathead Reservation, and to say that he approves of the first recommendation but not of the second. He thinks that in lieu of the second should be a requirement that the committee referred to shall report and make recommendations. He says he is not willing to make the determination covered by recommendation No. 2 in advance of the report of the committee. He thinks the committee had better examine into the matter and report as to whether and to what extent, the ditches should be taken into consideration on the question of charges.

JNO. HARVEY

Private Secretary [543]

Q. Mr. Biggerstaff I show you defendants' proposed exhibit number 23 and will ask you what that is?

A. That is a certified copy of a patent to the E¹/₂ NE¹/₄ of Section 16, Township 19 North, Range 19 West, in favor of Duncan McDonald.

Q. That is some of the land involved in this action, do you know?

A. To the best of my knowledge it is.

Mr. Wallace: We offer 23 in evidence.

(Testimony of Ray Biggerstaff.)

Mr. Smith: That land, I suppose, conforms to the description? [331]

Mr. Wallace: We hope so.

Mr. Smith: No objection.

Mr. Simmons: No objection.

The Court: In evidence without objection.

Defendants' Exhibit 23, the instrument referred to, was thereupon received in evidence without objection and is a part of the original exhibits in this case.

Q. I will show you defendants' proposed exhibit 24 and ask you what that is?

A. This is a certified copy of a patent in favor of Florence McDonald.

Q. That patent covers land involved in this action, so far as you know?

A. I think it does.

Mr. Wallace: We offer 24 in evidence.

Mr. Simmons: No objection.

Mr. Smith: We have no objection.

The Court: In evidence without objection.

Defendants' Exhibit 24, the instrument referred to, was then received in evidence without objection and is on file with the original exhibits in this case.

Q. And defendants' proposed exhibit 25 is what, Mr. Biggerstaff?

A. This is a certified copy of a patent in favor of Mary C. McDonald.

Q. And does that cover land involved in this action? A. It does.

(Testimony of Ray Biggerstaff.)

Mr. Wallace: 25 is offered in evidence. [332]

The Court: In evidence without objection.

Defendants' Exhibit 25, the instrument referred to, and so identified, *as* then received in evidence without objection, and is a part of the original exhibits on file in this case.

Q. I show you defendants' proposed exhibit number 26 and will ask you what that is?

A. Certified copy of patent to Frank Fiddler.

Q. And that covers land involved in this action?

A. Yes it does.

Mr. Wallace: We offer 26 in evidence.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 26, the document referred to, and so identified, was then received in evidence and is a part of the original exhibits on file in this case.

Q. And defendants' proposed exhibit 27 is what?

A. That is a certified copy of patent in favor of Mary and Joseph Deschamp—and Mary Rodgers Deschamp, heirs of William Deschamp, a Flathead Indian.

Q. And that patent covers land involved in this action?

A. It does.

Mr. Wallace: We offer it in evidence.

Mr. Smith: No objection.

The Court: It will be admitted.

Defendants' Exhibit 27, the document referred

(Testimony of Ray Biggerstaff.)

to, so identified, was thereupon received in evidence and is on file with the original exhibits in this case.

[333]

Q. And I will show you Defendants' Exhibit 28, and ask you what that is?

A. That is a certified copy of a patent in favor of Edward Deschamps.

Q. That patent covers land involved in this action? A. Yes it does.

Mr. Wallace: We offer Exhibit 28 in evidence.

Mr. Smith: No objection.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 28, the document referred to, was then admitted in evidence without objection and is a part of the original exhibits in this case.

Q. And Exhibit 29 is what, Mr. Biggerstaff?

A. That is a certified copy of a patent in favor of claimant, Oro Deschamp Freeman.

Q. That patent covers land involved in this action? A. It does.

Mr. Wallace: We offer 29 in evidence.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 29, so referred to, and so identified, was thereupon admitted in evidence and the same is on file with and forms a part of the original exhibits in this cause.

Q. And I show you Exhibit 30 and will ask you what that is?

(Testimony of Ray Biggerstaff.)

A. This is a certified copy of a patent in favor of John Minesinger.

Q. I will ask you if the land described in this patent is [334] involved in this action?

A. Yes it is.

Mr. Wallace: We offer 30 in evidence.

The Court: It will be admitted.

Defendants' Exhibit 30, so referred to, identified as such, was thereupon received in evidence and is a part of the original exhibits in this case.

Q. And Exhibit number 31 is what, Mr. Biggerstaff?

A. Certified copy of a patent in favor of James Waymack.

Q. And covers land involved in this action?

A. Yes it does.

Mr. Wallace: We offer Exhibit number 31.

The Court: It will be admitted.

Defendants' Exhibit 31, the instrument referred to and so identified, was thereupon received in evidence and is on file with the original exhibits in this case.

Q. And Exhibit 32 is what, Mr. Biggerstaff?

A. Certified copy of a patent in favor of Emma M. Magee.

Q. And covers land involved in this action?

A. Yes.

Mr. Wallace: We offer Exhibit 32 in evidence.

The Court: It will be admitted.

(Testimony of Ray Biggerstaff.)

Defendants' Exhibit 32, the instrument referred to, was thereupon received in evidence, so identified, and is a part of the original exhibits in this case.

Q. I show you defendants' proposed exhibit 33 and will ask you what that is, Mr. Biggerstaff?

A. This is a certified copy of an Amended Schedule of Lands [335] in the Flathead Indian Reservation subject to entry September 1, 1910.

Q. And does it contain information relative to the farm units subject to entry on that date?

A. Yes.

Mr. Wallace: We offer Defendants' Exhibit number 33 in evidence.

Mr. Simmons: No objection.

Mr. Smith: We object to Exhibit 33 in so far as it is or may be an attempt to bind any of the owners of farm units on the Flathead Reservation, for the reason that the same appears to be a letter—it does not appear that the letter was ever received by any of the owners of farm units or ever given any publicity or that the contents thereof were ever called to the attention of any of the purchasers of farm units, and that in the absence of some such showing, some letter which may have been written would not be binding on the owners of the farm units.

The Court: Objection overruled. The exhibit will be admitted.

Defendants' Exhibit 33, so received in evidence, and so identified, is on file with and forms a part of the original exhibits in this case.

(Testimony of Ray Biggerstaff.)

Q. Mr. Biggerstaff, at the time——

The Court: Just a moment; all of these exhibits, from 21 to 33, both inclusive, will be considered as read into the record; any party interested may refer to them at any time during the trial or in briefing, as a part of the record. Proceed.

DEFENDANTS EXHIBITS 23 - 32 and 34

Exhibits Nos. 23 to 32, inclusive, are certified copies of the original trust patents for the lands now owned by the defendants. These exhibits show that such lands were originally patented to Indian allottees on October 8, 1908. Exhibit No. 34 is a deed showing that the defendant Beckwith Mercantile Company on August 22, 1934, conveyed certain property occupied by the defendant, John A. Hazel, to Clarence L. McVey and Lillian L. McVey, husband and wife, by deed recorded subsequent to the commencement of this action.

DEFENDANTS' EXHIBIT 33

Exhibit No. 33 is a certified copy of an amended schedule of lands in the Flathead Indian Reservation, dated April 10, 1910. The lands therein described are Farm Units and lands not in Farm Units opened to settlement on September 1, 1910, under the Acts of Congress approved April 23, 1904, and May 29, 1908. The schedule gives instructions to settlers on surplus unallotted lands, and contains among other things the following:

(Testimony of Ray Biggerstaff.)

“The Government is now constructing irrigation works from which the farm units will be irrigated as far as possible, but it cannot at this time be told what part or how much of any particular unit can be furnished with water. It is probable that water can be furnished to only a small portion of some of these units, and it is possible that there will be no water at all for some of them, nor can it be told now when the water will be ready for any of these units, as the development of the irrigation projects has not yet proceeded far enough to enable the giving of definite [555] information on this subject at this time. All applicants must bear this fact in mind and make their selections accordingly, as they will act on their own responsibility and without any guarantee from the Government, and the fact that water has not or cannot be furnished will not excuse any entryman from a full compliance with the requirements of the law as to residence, cultivation, and the payment of the Indian price.” [556]

Q. (continued) Approximately where was the homestead [336] located, that you settled upon?

A. Well it was the east half of Section 25, 19-21.

Q. By 19-21 you mean Township 19, Range 21?

A. That's right.

(Testimony of Ray Biggerstaff.)

Q. And that's within this Flathead Project?

A. That's right.

Q. At the time that you homesteaded that land did you know whether or not there would be irrigation water available for you for use on that land?

A. As a future proposition we doubted it.

Mr. Simmons: No cross examination.

Mr. Smith: No cross examination.

Witness Excused.

CHARLES SANDERS

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. State your name? A. Charles Sanders.

Q. And where do you live? A. Arlee.

Q. How long have you lived there?

A. Well, thirty-three years.

Q. Where were you living in the spring of the year 1904? A. In Dillon, Montana.

Q. Did you leave Dillon, Montana, in the spring and summer of 1904? [337]

A. I did—not the spring—in the summer.

Q. At about what time? A. July 14.

Q. 1904? A. Yes sir.

Q. And where did you go?

(Testimony of Charles Sanders.)

A. I come to the Flathead Reservation.

Q. And to what town or place did you go to on the Flathead Reservation?

A. Saint Ignatius.

Q. And did you at that time or did you become, shortly thereafter, acquainted with Joe McDonald?

A. Yes sir I did.

Q. And Mr. Deschamps?

A. I was acquainted with Mr. Deschamps in the Bitter Root when we were kids; I was acquainted with Mr. Deschamps long before that, in the Bitter Root.

Q. Did you perform any work for Mr. Joe Deschamps and Mr. Joe McDonald and Mr. Deschamps that year? A. I did.

Q. What was that work? A. Ditch work.

Q. About when did you commence doing ditch work?

A. Well it was during the last of August or the first of September.

Q. Of——

A. ——Of 1904.

Q. And where was this ditch work you did?

A. Post Creek.

Q. Well on that work that you did was that on what is now [338] known as the McDonald-Deschamps Ditch?

A. Well I suppose it was; I have never been back there since the work was done.

(Testimony of Charles Sanders.)

Q. Well where did you do this work—ditch work—that you did?

A. Right at the mouth of the Lake.

Q. What Lake? A. At McDonald Lake.

Q. And did the ditch divert water or did it connect with some creek? A. Post Creek.

Q. How far approximately below the Lake did the ditch tap the creek?

A. Well I should judge maybe 50 feet.

Q. You haven't been back there, you say, since you dug this ditch? A. No sir.

Q. You started the latter part of August, or September—how long did you work?

A. Well about a month, I have an idea about a month, as near as I can remember.

Q. Was anyone helping you? A. Yes sir.

Q. Who? A. William Turnidge.

Q. And about how many feet or rods or miles of ditch did you construct?

A. Well about a mile I should judge.

Q. And tell us whether or not the ditch that you dug came out of the timber? [339]

A. Well I worked until we got out to the edge of the timber—just the edge of the timber.

Q. Do you know who afterwards that land was allotted to where you stopped digging the ditch?

A. Well not only just hearsay, yes.

Q. Was that the Duncan McDonald allotment?

A. Well I couldn't say.

(Testimony of Charles Sanders.)

Q. But the ditch—you did dig the ditch clear from the timber on out in the open?

A. Out into the open, yes sir.

Q. Was there anyone else worked on that ditch besides you and Mr. Turnidge?

A. Well we worked by contract for a short time and then we went to work for wages, and Joe Deschamps was up there some and bossed the job, and Bill Deschamps.

Q. And did anyone actually work on the ditch besides you and Turnidge?

A. I think a man by the name of Murray worked on the ditch some.

Q. Are you sure that that portion of the ditch was constructed in the year 1904? A. Yes sir.

Q. Did you construct any more of the ditch to the various lands of the defendants in this case?

A. No.

Q. That's all you did? A. Yes sir.

Mr. Simmons: No cross examination.

Mr. Smith: No cross examination.

Witness Excused. [340]

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

vs.

B. W. ALEXANDER, et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 495 to 664

FILED

JUN 11 1942

PAUL P. O'BRIEN,

CLERK

Upon Appeals from the District Court of the
United States for the District of Montana.

United States
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Upon Appeals from the District Court of the
United States for the District of Montana.

JOHN McDONALD

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name Mr. McDonald?

A. John McDonald.

Q. How old are you? A. Forty-nine.

Q. And what was your father's name?

A. Joe McDonald.

Q. And was your father the same Joe McDonald, the one who has been referred to here as the builder of the McDonald-Deschamps Ditch?

A. Yes sir.

Q. Now who is Duncan McDonald?

A. He is my brother.

Q. Do you know where his allotment is located?

A. Yes it is up there, the Alexander place.

Q. Is that the place that is now owned by Mr. Alexander? A. Yes sir.

Q. Do you recall when this ditch was constructed by Mr. Sanders and Mr. Turnidge? A. Yes.

Q. Where were you living at that time?

A. Down on Post Creek.

Q. With your parents? A. Yes.

Q. Now do you know when this ditch was finished or continued or extended from the place where Mr. Sanders stopped until it [341] went on the land of these——

(Testimony of John McDonald.)

A. —The next year.

Q. Johnny, in the year 1904, what was your father doing?

A. Well he was running a lot of cattle at that time, and in the cattle business, and putting up a lot of hay.

Q. And whereabouts on the Reservation was he running his cattle?

A. Well we run them all over, around Pablo, now, and in that country, and in the Mission, was all open country then.

Q. Well did he have any land fenced up?

A. Yes.

Q. Well where were those lands?

A. Well we had a big bunch of land on Post Creek fenced, and we had a big bunch up there where these people is now—it was, oh I guess he must have had 1500 acres fenced in there.

Q. And was the land that he had in fence up on Post Creek, did that include the lands that are now owned by the defendants in this action?

A. Yes some of them.

Q. You are acquainted with Mr. Alexander's land are you? A. Yes.

Q. And Mr. Knutson's? A. Yes sir.

Q. And Mr. Hazel's? A. Yes sir.

Q. And Mr. Stevens's? A. Yes sir.

Q. And do you know where Tom Wald's land is? A. Yes sir.

(Testimony of John McDonald.)

Q. And Mr. Minesinger's land? [342]

A. Yes sir.

Q. Now what parts of those lands were included within this fence job that your dad had?

A. Well he had Knutson's place, now, and Mr. Hazel's and Mr. Alexander's, and he had a lot of other land—it was in one fence there, you see; they said you could go out and fence the whole place up; that was before the allotting.

Q. Well what did he raise, stock, on this land?

A. Yes sir.

Q. Did he farm or cut any hay on this land?

A. Yes sir.

Q. Who is Florence McDonald?

A. She is my sister.

Q. And she has a place up there?

A. Yes sir.

Q. You are acquainted with her allotment?

A. Yes sir.

Q. Who owns that land now, do you know?

A. Mr. Hazel.

Q. Now going back to 1904 and 1905, up to 1909, I will ask you if you know whether your father raised any hay on the Florence allotment?

A. Yes sir he did.

Q. Can you tell the Court, Johnny, whether he used any irrigation water on that allotment during the years 1905 to 1909?

A. Yes he did.

Q. What did he raise on that allotment?

(Testimony of John McDonald.)

A. Well he was raising hay and some grain.

Q. Was this hay tame hay or wild hay?

A. It was a kind of a wild hay. [343]

Q. Did he harvest that hay? A. Oh yes.

Q. For his stock? A. Yes.

Q. Now who is Mary C. McDonald?

A. She is my sister.

Q. Can you tell the Court, Johnny—going back to Florence's allotment—about how many acres of Florence's allotment was irrigated?

A. Well that's a tough kind of a—it has been so long ago it is kind of a hard question for me to answer—but there was several acres that was irrigated.

Q. Now you say Mary C. McDonald is your sister? A. Yes.

Q. And was her land within the fence that your dad had? A. Yes.

Q. These allotments of course were made, were they not, later?

A. Yes they were made later.

Q. Now tell the Court whether or not your father raised any crops or hay on Mary's allotment? A. Yes he did.

Q. And did he use any water to irrigate that allotment with?

A. Yes he used—yes he used some water on it.

Q. What did he raise on Mary's allotment, mostly hay and grain?

(Testimony of John McDonald.)

A. Well he raised hay and some grain and there was a pasture.

Q. Did your father use water for irrigating the pasture too?

A. Well yes, yes he—you see we had a man working for us about two years, a Mr. John Lewellen and he was pretty familiar with irrigating and he done all the irrigating out there. [344]

Q. Where is Mr. Lewellen now, do you know.

A. The last I heard of him he was in California.

Q. Did your father have some other men up there irrigating before Mr. Lewellen went to work for him?

A. Well now that's—I couldn't—that is a kind of a hard——

Q. ——Well let me ask you if you remember a man by the name of Marcure? A. Yes.

Q. What was his first name? A. Pete.

Q. Pete Marcure? A. Yes.

Q. Did he ever work for your father?

A. Yes.

Q. And did he work on some of these allotments? A. Yes sir he did.

Q. Did he work up there before Mr. Lewellen did? A. Yes I think he did.

Q. Would you say that Marcure and Lewellen both worked there for your father between the years 1905 and 1909?

A. Yes I think so—yes they did—that is. they didn't work all the time.

(Testimony of John McDonald.)

Q. I didn't mean that—but between those years they were working there for your father?

A. Yes.

Q. Did Marcure do any irrigating?

A. Yes he did.

Q. Do you recall how long he worked?

A. Well he just worked one summer there for us.

Q. And how many summers did Lewellen work?

[345]

A. He worked for us about two—either two or three years—it has been so long—and he worked for us.

Q. Well who was Frank Fiddler?

A. Well Frank Fiddler was an adopted son of Ed Deschamps.

Q. Were you acquainted with Ed Deschamps?

A. Yes, well acquainted with him.

Q. Is he living now?

A. No he is dead.

Q. Frank Fiddler was his adopted son?

A. Yes.

Q. Do you know whether or not he was allotted up in that vicinity?

A. Yes he was allotted up there.

Q. Was the land that was afterwards allotted to him under this fence of your father's?

A. Well I think there was some of it was, a corner of it was under his fence.

(Testimony of John McDonald.)

Q. Do you know whether or not your father, prior to 1909, irrigated any of Frank Fiddler's place?

A. Who, my father?

Q. Yes.

A. No.

Q. Your father irrigated some of Mary's place, you stated?

A. Yes he irrigated on Mary's and Florence's and then on Duncan's and then Louie Head's place.

Q. He irrigated Duncan's allotment?

A. Yes Duncan's and Louie Head's place.

Q. And Mary's allotment?

A. Yes.

Q. And Florence's? [346]

A. Yes.

Q. And Louie Head's place?

A. Well not all of Louie Head's—there was a corner of it in there.

Q. Well Louie Head's place is located just south——

A. ——South of Alexander's.

Q. Well who was or is William Deschamps?

A. Well he was a brother of Ed Deschamps; he was my mother's brother.

Q. Oh he is then, he is your uncle?

A. Yes.

Q. Was he allotted some land up in that country?

A. Yes, he is where Mr. Stevens—Avery Stevens—has got his place.

Q. Was that land within the fence that your father had up there?

A. No, there was a line fence in there but after

(Testimony of John McDonald.)

they allotted it then they put the fence on the line, and he had a fence across there.

Q. Do you know whether or not there was any of the William Deschamps allotment irrigated?

A. Yes I remember when they irrigated some over there.

Q. Can you say approximately how much, Mr. McDonald, if you remember?

A. No I don't, but I know there was irrigation on there.

Q. What did he raise, hay or grain, or what?

A. Well they raised hay and grain, yes.

Q. Now Edward Deschamps, who was he?

A. Well he was one of my uncles too.

Q. He was a brother of William? [347]

A. Yes.

Q. And the son of Joe Deschamps?

A. Yes.

Q. Was he allotted on there? A. Yes.

Q. And did your father have his land within his fence, do you remember?

A. No I don't know—no we didn't have none of his, not at that time.

Q. You don't know whether your father raised any hay on Edward Deschamps' place or not?

A. No.

Q. Did Joe Deschamps farm William Deschamps' allotment? A. Yes he did.

Q. And do you know whether or not he used any irrigation water on William Deschamps' place?

(Testimony of John McDonald.)

A. Yes he did.

Q. For what purpose?

A. Well it was some hay and grain.

Q. And would you be able to tell the Court now how much you recall of the William Deschamps place that was irrigated during those three or four years?

A. No I couldn't, it is kind of hard for me.

Q. Well what about the Edward Deschamps allotment, did Joe Deschamps farm that?

A. No he didn't farm that, Ed Deschamps farmed it himself.

Q. Did he raise any hay on it?

A. Yes he raised hay and grain.

Q. Did he have any stock? Did he own any stock?

A. Yes he had stock. [348]

Q. Did Joe Deschamps have stock?

A. Yes.

Q. Now can you tell us whether Ed, in farming his place, used any water to irrigate his place?

A. Yes he used some water.

Q. The Deschamps are all of Indian blood, aren't they?

A. Yes.

Q. You are a member of the Flathead Tribe yourself?

A. Yes sir.

Q. And your father?

A. Yes sir.

Q. Now Oro Deschamps, who was he, or is he, Johnny?

(Testimony of John McDonald.)

A. Well she was Ed Deschamps wife, she was a white woman—she was adopted later by the tribe.

Q. Is she living now or dead?

A. No I think she is dead.

Q. And was she allotted some land up in that country? A. Yes she was allotted.

Q. Do you know whether her land was farmed or not during the years 1905 to 1909?

A. Yes that was farmed, Ed Deschamps farmed that.

Q. Can you tell the Court whether or not he used any water on that land?

A. Yes I remember when he used some water down there.

Q. I believe you stated that all of these Deschamps that we have been talking about were and are Indians, Johnny? A. Yes.

Q. All of them members of the Flathead Tribe?

A. Yes they are all members of the Flathead Tribe.

Q. Well are you acquainted with John Minesinger? [349]

A. Yes I am well acquainted with him.

Q. How long have you known him?

A. Oh I have knowed John ever since I was a boy.

Q. And are you acquainted with Andy Magee?

A. Yes, well acquainted with him.

Q. Is he—do you remember whether or not they built a ditch?

(Testimony of John McDonald.)

A. Yes I remember when they built their ditch.

Q. And are you familiar with the approximate location of the Magee-Minesinger Ditch now?

A. Yes, that is, I know of it, I have been by it several times and know where it comes out of the creek.

Q. I believe you said that you were living on Post Creek in 1904 when the McDonald-Deschamps Ditch was dug, didn't you? A. Yes.

Q. You were living down near the old Fort?

A. Well just above the old Fort, about a half mile above the old Fort.

Q. What fort was that—what was the name of that Fort? A. Fort Konah.

Q. Fort Connah, wasn't it? A. I think so.

Q. Did you afterwards, or your father and your family afterwards move up on to some of these allotments?

A. Yes we moved up there—you mean up on the Alexander place?

Q. Yes, up in that vicinity?

A. Yes we moved up there.

Q. About when did you move up there, do you know? [350]

A. Well you see we was back and forth; I remember when we moved up there, we got up there in the summer time and we then lived in a tent up there one summer while they were doing some work up there, and——

(Testimony of John McDonald.)

Q. Was that before 1909? A. Yes.

Q. Whereabouts were you living when you were living in the tent?

A. We was living right down where Mr. Hazel's house is now, or just south of Mr. Hazel's house there.

Q. And was that on some of this land that is now involved in this law suit?

A. Yes he put in an orchard there where Mr. Hazel's house is now.

Q. And you lived up there in the summer?

A. Yes for a few years and then we moved—when we got through haying we moved up there and we stayed there—it was in 1908 that we moved right up there and stayed there then.

Q. In 1908? A. Yes.

Q. Built a house?

A. Yes we had a house, Mr. Magee he built the log house where we were.

Q. Johnny will you tell the Court, these allotments there that were made to you Indians by the government, were they picked out by you and your father and your sister and brother? A. Yes.

Q. Before the allotments were actually made?

A. Yes they were, yes, my father picked them out.

Q. He picked out one for himself? [351]

A. No he picked them out for my brothers and sisters.

(Testimony of John McDonald.)

Q. Did he select an allotment for himself also?

A. No he didn't, his own allotment was in Idaho.

Q. Oh, it was just your mother and you two children? A. Yes.

Q. That were allotted on this reservation?

A. Yes.

Q. And your father picked out those allotments for you before the allotments were actually given to you by the government? A. Yes.

Q. How long after you moved up there in 1908 did you folks live up there?

A. Well we—I lived up there about—now I—it is kind of hard for me, but we—

Q. —Well just approximately?

A. We must have lived up there five or six years; then my father rented the place, that is, there was a couple of fellows from Spokane, the Sturgis brothers, they had a homestead in the Moiese Valley, they homesteaded there in 1910, and then they moved up from Moiese and they stayed on that place up there and they farmed it; that is, they was on the place that is Mr. Hazel's place now, and Mr. Knutson's and Duncan's place, and they farmed there and they were there I suppose two or three years.

Q. During the time you folks were living up there with your dad did you raise some crops on it?

A. Yes.

(Testimony of John McDonald.)

Q. Were those just small crops or were they big crops?

A. Oh they were just medium sized crops. [352]

Q. Raised some wheat?

A. Yes we raised some; I ploughed, myself, up there.

Q. Oats? A. Oats and wheat, yes.

Q. Ever take any of that wheat down to the mill at the——

A. ——Yes sir we hauled some of it clean to Ravalli, with wagons, up there.

Q. Did you have any ground at the Fathers' mill at the Mission?

A. I think we did, yes.

Q. Did you tell me recently, Mr. McDonald, that you could go up there and now find a lot of old ditches that you folks had that are not being used now?

A. Yes, right to that Louie Head place.

Q. What about the Alexander place?

A. Well to that place too—well I don't say now—it has been ploughed up—but there is one ditch there, I know, my father made, dug through the middle of the Alexander place—it flows on to the Louie Head place.

Q. Did you see them take water down to the Louie Head allotment? A. Yes they did.

Q. That is just below the Alexander place?

A. Yes.

Q. Did you raise crops on that place?

(Testimony of John McDonald.)

A. Yes we raised crops and raised a little hay on there.

Q. And irrigated it?

A. That is—now I went a little too fast there—but we raised hay where this—just—you see the ditch comes to one corner there—there was an old cabin in there and a hay [353] meadow in there—well we irrigated that and raised hay, and then above, just dry land, we raised grain there.

Q. You did use some water on the Louie Head allotment?

A. Yes we irrigated a meadow there.

Q. On the Louie Head allotment?

A. Yes.

Cross Examination

By Mr. Simmons:

Q. The hay you referred to on the Head allotment was not irrigated, it was a dry farm?

A. Some of it was dry farmed, the same as this Alexander place, well he has got some of the same ground we farmed that he dry farms now.

Cross Examination

By Mr. Smith:

Q. Who owns the Louie Head place now?

A. Well my father owns it.

Q. He owns it now?

A. Yes; this Louie Head lived with me when he was a boy, he lived with us too, and he stayed right with us all the time, and he died, I think, about

(Testimony of John McDonald.)

seven or eight years ago, and he willed his farm to my dad later.

Q. Is your dad farming that place now?

A. No.

Q. Who is farming it?

A. There ain't nobody farming it.

Witness Excused.

Whereupon at 5:00 o'clock p. m. of said day adjournment was had until 10:00 o'clock the following morning, May 8, [354] 1940, when the trial was resumed.

Mr. Wallace: May it please the Court, may I recall Charles Sanders for a few questions?

The Court: Very well.

CHARLES SANDERS,

witness for the defendants, was recalled and testified as follows:

Direct Examination

(continued)

By Mr. Wallace:

Q. Mr. Sanders during the time that you were constructing the McDonald-Deschamps Ditch did you do any trading with the merchants on the reservation? A. Yes sir.

(Testimony of Charles Sanders.)

Q. With whom? A. George Beckwith.

Q. And where was Mr. Beckwith located at that time?

A. Well he was located—well it was in an old log cabin close to the store that stands there now.

Q. And that was in what is now Saint Ignatius?

A. Yes sir.

Q. And near the Catholic Mission?

A. Yes.

Q. And you purchased your supplies from him?

A. Yes sir.

Q. And did you have an account with him at that time? A. Yes sir.

Q. And was that the only time you ran an account there? A. Yes sir. [355]

Mr. Simmons: No cross examination.

Witness Excused.

ANDY MAGEE

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name is Andy Magee?

A. Yes sir.

Q. Are you the Mr. Magee after whom the Magee-Minesinger Ditch is named or called?

(Testimony of Andy Magee.)

A. Yes sir.

Q. When did you go on the reservation first,
Mr. Magee? A. First?

Q. Yes, what year? A. 1888.

Q. Did you leave the reservation?

A. Yes I left it.

Q. And then when did you go back?

A. I went back again in 1906.

Q. Were you a married man in 1906?

A. Yes sir.

Q. Was your wife a member of the Flathead
Tribe of Indians? A. She was.

Q. Was her name Emma Magee?

A. Yes sir.

Q. Who is James Waymack?

A. That is my stepson. [356]

Q. Now in 1906 where did you go to, upon the
reservation?

A. I went down there looking around these al-
lotments, and I went to Post Creek and located the
place which I sold to Mr. Wald in later years.

Q. And what year did you locate on that piece
of land? A. In 1906.

Q. And was that piece of land the same piece
of land that was afterwards allotted to your wife?

A. Yes sir.

Q. And did you construct any buildings on that
allotment?

A. I built a little house and little barn.

Q. And when did you do that?

(Testimony of Andy Magee.)

A. I built them in the fall of 1906 and I wintered there that winter.

Q. And your stepson Waymack lived there with you?

A. No he didn't, not at that time.

Q. Did he later?

A. Well no, he come and stayed there a while, and then he went to school, to Oregon.

Q. Did you select an allotment for him?

A. I picked it for him.

Q. And was that before it was actually allotted to him?

A. No it wasn't allotted at the time I picked it.

Q. It was afterwards allotted to him?

A. Yes sir.

Q. And did you fence your wife's allotment?

A. I did.

Q. When?

A. I fenced it the spring of 1907.

Q. And what about the James Waymack allotment? [357]

A. I fenced it the same time.

Q. Did you farm those two pieces of land?

A. I did.

Q. When did you commence farming them?

A. I began farming them in 1907.

Q. Now did you help construct the Magee-Minesinger Ditch? A. I did.

Q. And where did you take that from—what creek did you take that ditch out of?

(Testimony of Andy Magee.)

A. Post Creek?

Q. And out of McDonald Lake?

A. A little ways below the outlet of McDonald Lake—just below the McDonald and Deschamps Ditch.

Q. Who helped you build that ditch?

A. George Buckhouse.

Q. And is it sometimes referred to as the Magee-Minesinger Ditch?

A. Well you will have to ask somebody else, I don't know.

Q. Well did Minesinger use that ditch?

A. Well Buckhouse had Minesinger's land on an improvement plan; he was to fence it and build a house and help put in that ditch.

Q. And when did you build that ditch?

A. In the spring of 1907.

Q. And George Buckhouse helped you?

A. George Buckhouse helped me.

Q. Is that the same ditch that he helped you dig in the spring of 1907, is that the ditch that is now being used and known as the Magee-Minesinger Ditch?

A. It is. [358]

Q. How much land—do you know how much land Mr. Buckhouse was farming then?

A. Buckhouse was farming 160 acres.

Q. And that was the Minesinger land?

A. Yes.

Q. Well what did you build this ditch for?

A. To get water to irrigate with.

(Testimony of Andy Magee.)

Q. Why did you need water to irrigate with?

A. Well I just considered that if I didn't have water—well if I had water and lots—plenty of it, I would naturally have no crop failures, and if I didn't have, why it is a gamble and you don't know whether you are going to have anything or not.

Q. When did you first use water for irrigation purposes? A. In 1907.

Q. On your wife's allotment? A. Yes sir.

Q. Did you use any water for irrigation on the Waymack allotment? A. Yes sir.

Q. In 1907? A. Yes sir.

Q. Will you tell the Court, Mr. Magee, approximately how much—what part—how many acres of your wife's allotment you broke up in 1907?

A. About 40 acres.

Q. Did you break up any on the Waymack allotment? A. No I didn't.

Q. How many of those 40 acres did you irrigate in 1907? What part of the 40 acres that you broke up did you irrigate [359] in 1907?

A. It was the north end.

Q. North part? A. North forty.

Q. How many acres did you irrigate?

A. About forty.

Q. Did you afterwards break up some more of your wife's allotment?

A. Broke it all up.

Q. When did you break up the balance of your wife's allotment?

(Testimony of Andy Magee.)

A. I broke that up in the fall of 1907.

Q. And when did you break up the Waymack place?

A. Well I broke that up at different times, and what I didn't plough, well I used it for pasture; I had quite a few stock.

Q. Well when you got your wife's allotment entirely ploughed up did you apply water for irrigation to the whole of it? A. Yes.

Q. And is that true also with reference to the Waymack allotment?

A. Sure, and I irrigated Waymack's before I ploughed it, and for a hay pasture too.

Q. How much, then, of your wife's allotment did you irrigate? A. All of it.

Q. And how much of the Waymack allotment did you irrigate?

A. Well it was a little corner in the southeast that I couldn't get on to without going up into the allotment of Joe [360] Turnage; on account of a little dip in the ground I would have to go on his place, and that I let go.

Q. About how many acres in that little corner?

A. Oh three or four, I don't know, it was a three-cornered patch.

Q. How much of the balance of the Waymack allotment did you irrigate?

A. I irrigated the rest of it.

Q. Now then how long did you continue to occupy these two pieces of land? A. Until 1917.

(Testimony of Andy Magee.)

Q. And during all of the years from 1907 to 1917 did you use water from this ditch for irrigation?

A. I sure did.

Q. On both of these allotments?

A. Both of them pastures.

Cross Examination

By Mr. Simmons:

Q. Mr. Magee, referring to Plaintiff's Exhibit 8, which is a—contains the so-called Secretarial rights to your wife's allotment and to the James Waymack allotment, I will ask you if you are familiar with the grants made by the Secretary?

A. No sir I wasn't.

Q. You were aware of the fact that those lands were granted private water rights, certain acreage on those lands, by the Secretary of the Interior?

A. I wasn't.

Mr. Simmons: I call the Court's attention to the Plaintiff's Exhibit 8, wherein the Emma Magee allotment—

Q. —That was your wife's allotment? [361]

A. Yes sir.

Mr. Simmons: —was granted a full water right by the Secretary of the Interior to an acre on that allotment.

Q. And on the James Waymack allotment you state that you irrigated or that there was irrigated in 1907 all but three acres—or four acres?

A. No I didn't state that.

(Testimony of Andy Magee.)

Q. What did you state? A. In 1907.

Q. What year was it, Mr. Magee?

A. He asked me how much I irrigated while I had it and I said practically all but that three or four acre corner piece, in the southeast corner.

Q. How many acres would you say you irrigated?

A. Well just as a general proposition it was a three-cornered piece, and I didn't measure it; I just cut it off because I would have to go up on another man's piece of land to get my ditch on it, but I should judge there was between three and four acres, maybe five acres, and I don't think more than that.

Q. That you irrigated or didn't irrigate?

A. That I didn't irrigate because I couldn't get water on it.

Q. And do you know how many acres there was in the allotment?

A. The entire field was supposed to be 80 acres but I had to give the county 30 feet on the west and 30 feet on the south.

Q. That was the James Waymack allotment?

A. Yes sir, for roads.

Mr. Simmons: For the Court's information I wish to refer again to Plaintiff's Exhibit 8, containing a Secretarial [362] grant to the James Waymack allotment number 689, in which the Secretary recognized a grant or right to 52.3 acres on the James Waymack allotment number 689.

(Testimony of Andy Magee.)

The Court: What is the allotment, how many acres?

Mr. Simmons: To 80 acres.

Q. I wish to refer to Plaintiff's Exhibit number 10, Mr. Magee, and I will ask you if you know that from October 30, 1914 to November 30, 1914, certain engineers of the United States Reclamation Service made a transit stadia survey of the lands of James Waymack—that is, if you know certain engineers were on there and surveyed?

A. I know there were engineers that were around there all the time; you could see one in sight pretty nearly any time.

Q. You have never seen the report?

A. But I don't know who they were.

Q. I wish to refer you to this—that portion of Plaintiff's Exhibit 10 which contains the survey made by R. W. Lincoln, a junior engineer of the United States Reclamation Service, between October 30, 1914 and November 30, 1914. The report, Mr. Magee, shows that on this allotment there was unirrigated on the NW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 17, Township 19 North, Range 19 West, 39.9 acres?

A. That was?

Q. That was not irrigated?

A. On the NW $\frac{1}{4}$?

Q. On the NW $\frac{1}{4}$?

A. On the NW $\frac{1}{4}$ —well the engineer that put that on there, there was something the matter with

(Testimony of Andy Magee.)

his head, because I'll tell you, that was one of the first pieces on the Waymack place that I irrigated.

[363]

Q. And then on the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$ of Section 17, Township 19 North, Range 19 West, he shows 39.7 acres not irrigated?

A. Well I didn't irrigate any then, hardly, did I?

The Court: All right, the district, I think, has testified there were.

Mr. Simmons: Well if the Court please, they were allowed per acre—referring to the Plaintiff's Exhibit number 8, the James Waymack allotment, the grant shows "that said 52.3 acres hereinbefore described are determined to have a valid and subsisting water right from Post Creek," which is based upon testimony and upon the stadia survey made by the engineer, even though it shows it was unirrigated, it possibly may have been used for pasture.

The Court: Well they may have irrigated pasture, may they not?

Mr. Simmons: That is very true, but I will call Mr. Sperry——

The Court: —Well the Secretary had authority to do what he did; is the government now in position to question him?

Mr. Simmons: We are not questioning the authority.

The Court: You are questioning the right, in this case——

(Testimony of Andy Magee.)

Mr. Simmons: —Probably Mr. Sperry can clear this up when he can take the stand.

The Court: Well you are the lawyer and he is the engineer; I am asking you whether in this case you question the right——

Mr. Simmons: —We are not questioning the right of the Secretary—— [364]

The Court: —To irrigate 52.3 acres.

Mr. Simmons: Not at all, your Honor, we are merely showing by this proof that the Secretary recognized more than was actually irrigated, gave a right to more land than was actually irrigated, according to the report of the engineer made in 1914. Now, if the Court please, this report was made in 1914; the testimony of the witnesses at the hearings held may have been to the effect that these lands were irrigated prior to 1914, when the stadia survey was made, which would have given the Secretary reason enough to have recognized that right.

The Court: Well the testimony of the witness is that he began breaking up on the Magee allotment in 1907; that he irrigated 40 acres that year, and the following year he broke the remainder and irrigated all of it. The testimony of the witness is that at a little later date he broke the entire Waymack allotment with the exception of three or four acres in the southeast corner.

The Witness: Well I broke that too but I didn't irrigate it.

(Testimony of Andy Magee.)

Mr. Simmons: Well the Secretary—we are not contesting the right at all, that the Secretary granted to the Emma M. Magee allotment or to any of these allotments; for that matter, the Secretary granted a full right to the Emma M. Magee allotment.

The Court: The question is whether we shall believe the testimony of a living witness on the stand or take the report of the junior engineer; candidly, I would rather have the testimony of the living witness than the junior engineer, if the living witness is of the right type. [365]

Mr. Simmons: I can refer to this same report on Exhibit 10, on the Emma Magee allotment, and the stadia investigation between October 30, 1914 and November 30, 1914, on the Emma Magee allotment, which shows that there was possibly irrigated on the NE $\frac{1}{4}$ 40 acres and on the SE $\frac{1}{4}$ 20 acres, and the Secretary granted a right to the full 80 acres, showing that certainly from the testimony there was undoubtedly pasture used on those two allotments or some irrigation done.

The Court: Any further cross.

Mr. Simmons: No further.

Cross Examination

By Mr. Smith:

Q. Do you know what time the various portions of the Waymack allotment were brought under irrigation?

(Testimony of Andy Magee.)

A. Just as I got time—you mean brought under irrigation?

Q. Yes.

A. Oh it was brought under irrigation in 1907 and 1908.

Q. That is, a part of it was it not—you irrigated a part of the Waymack allotment, in 1907 and 1908?

A. Well in fact I irrigated all that could be irrigated.

Q. You mean that in 1907 and 1908 you irrigated all but three or four acres?

A. But I wasn't farming it all because I had quite a little stock and I thought that they would sooner eat green grass than dry grass.

Q. So that in 1907 and 1908, if I understand you correctly, you farmed a part of the Waymack allotment and used the remainder of it for pasture?

A. Yes sir.

Q. And at that time irrigated all but three or four acres? [366]

A. Yes sir.

Q. In the southeast corner? A. Yes sir.

Q. Is that right? A. Yes sir.

Witness Excused.

GEORGE BUCKHOUSE

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. What is your name?

A. George Buckhouse.

Q. And where do you live?

A. Saint Ignatius, Montana.

Q. And that is on the former Flathead Indian Reservation? A. Yes sir.

Q. What is your business up there now?

A. Butcher business.

Q. When did you first go up on the Flathead Reservation? A. In 1906.

Q. And what work or occupation did you follow or then enter upon?

A. Well I done some threshing first.

Q. What?

A. Run the threshing machine when I first went there.

Q. Did you later settle on the Minesinger land?

A. I did. [367]

Q. Are you acquainted with John Minesinger?

A. I am.

Q. And his wife Ada—is it? A. Julia.

Q. You are acquainted with Mr. Magee—Andy Magee? A. I am.

Q. Where were the Minesingers living when you went up on the reservation in 1906?

(Testimony of George Buckhouse.)

A. They were living in Missoula.

Q. Had they at that time selected any land?

A. Yes they had.

Q. And is that the same land that was afterwards allotted to John Minesinger and Julia Minesinger?

A. That's right.

Q. Well did you afterwards farm that land?

A. I did.

Q. Well when did you enter upon that land for the purpose of farming it?

A. 1907.

Q. About what time?

A. Oh I imagine about the first of March.

Q. Did you rent that land?

A. I did.

Q. From the Minesingers or from the government?

A. From the government and the Minesingers too.

Q. Well did you help Mr. Magee construct what is now known as the Magee-Minesinger Ditch?

A. I did.

Q. And was that the same ditch that you and he built and that the same ditch that is now in use and known as the Magee- [368] Minesinger Ditch?

A. It was.

Q. Can you tell the Court what year that ditch was built?

A. It was built in 1907.

Q. And the purpose of it was for what?

A. Irrigating the Minesinger allotments and the Magee allotments.

(Testimony of George Buckhouse.)

Q. And did you actually use the water from that ditch to irrigate the Minesinger land?

A. I did.

Q. Had any of this land been broken up?

A. Had any of it, you say?

Q. Yes. A. Yes it had.

Q. And was it all broken up, or did you break it? A. I broke it up, all of it.

Q. And that was when?

A. In 1907—I didn't break it all up in 1907.

Q. Well how much of the John Minesinger allotment did you break up in 1907?

A. I imagine about 60 acres.

Q. And did you use water on it from this ditch?

A. I did.

Q. On that allotment? A. I did.

Q. In 1907? A. Yes sir.

Q. For farming purposes or pasture purposes?

A. Both.

Q. Will you tell the Court how many acres of the John [369] Minesinger allotment you irrigated in 1907?

A. Well I imagine around about 60 acres.

Q. How long did you occupy those lands?

A. Four years.

Q. And did you later put any more of the John Minesinger allotment under irrigation?

A. I did.

Q. What year? A. 1908.

(Testimony of George Buckhouse.)

Q. At the end of 1908 how much of this allotment did you have under irrigation?

A. The Minesinger—John Minesinger allotment?

Q. Yes.

A. The two allotments or the one?

Q. The John Minesinger allotment?

A. Well I put all of it.

Q. Well you know the John Minesinger allotment do you not?

A. Well I couldn't be sure just which allotment it is—I had the two of them together.

Q. Julia's and John's. Well how many acres of the Julia Minesinger allotment did you put under—

A. —Well I had both allotments under irrigation.

Q. Well at the end of 1908 then, how much of both of the allotments did you have under irrigation?

A. Well practically all of it but maybe three acres.

Q. Might I suggest to you, Mr. Buckhouse, that the John Minesinger allotment is described as the $S\frac{1}{2}$ of the $NW\frac{1}{4}$ and the Julia Minesinger is described as the $N\frac{1}{2}$ of the $NW\frac{1}{4}$, of Section 17?

A. Yes. [370]

Q. Julia's lays to the north and John's to the south; and so you say that you had practically all of those two allotments under water? A. I did.

Q. For farming and pasture purposes?

(Testimony of George Buckhouse.)

A. Yes sir.

Q. And did you continue to use water on both of those allotments during the remainder of the four years that you were there? A. I did.

Q. Now when you were there on that allotment did you dig a well? A. I did.

Q. On which allotment?

A. On the Julia Minesinger allotment.

Q. Tell the Court what character of soil you ran into where you dug this well; was it gravel or clay or black soil?

A. Well part of it—different layers—some of clay, some black dirt and some sand and gravel.

Q. Is there any gravel on this Julia allotment?

A. Well there are places there is, yes.

Q. Do you know whether or not there is a streak of gravel that runs down through the Minesinger allotment and into the Emma Magee allotment?

A. There is, yes.

Q. And is that gravel quite near the surface of the ground? A. Yes it is.

Q. Can you tell the Court, or do you know approximately how many acres of this John Minesinger allotment has gravel?

A. Well I imagine there is around about 20 acres of it.

Q. Are you able to state approximately how many acres on the [371] Emma Magee allotment has gravel on it? A. The Emma Magee?

(Testimony of George Buckhouse.)

Q. If you know—I'm asking you if you know?

A. I imagine there is about 30 acres of it.

Q. And is that the same streak of gravel that runs down through those lands? A. It is.

Cross Examination

By Mr. Simmons:

Q. You know, Mr. Buckhouse, that the Secretary of the Interior granted a right to—so-called private Secretarial right—to 75.4 acres on the John Minesinger allotment? A. I do not.

Q. Did you appear before the committee at the time the investigation was made? A. I did.

Q. You never knew the findings of the committee? A. No.

Q. And on the Julia Minesinger allotment to 77.4 acres?

A. I don't know how much was allotted.

Q. You stated that practically all of the lands on these allotments were irrigated; were there a few acres that were not irrigated? A. There were.

Q. And these findings of the Secretary would probably represent the approximate acreage actually irrigated? A. I imagine.

Redirect Examination

By Mr. Wallace:

Mr. Wallace: I overlooked a few questions I would like [372] to ask the witness, if your Honor please.

(Testimony of George Buckhouse.)

The Court: Very well.

Q. Were you acquainted with Joe McDonald and Deschamps? A. I were.

Q. At that time? A. I were.

Q. Do you know whether or not the McDonald-Deschamps Ditch had already been constructed when you——

A. —It had been.

Q. Of course you were acquainted with the land that was afterwards allotted to William Deschamps?

A. I was.

Q. And Ed Deschamps? A. Yes sir.

Q. And the land that was also allotted afterwards to Frank Fiddler? A. I was.

Q. Can you tell the Court whether any of these lands were being irrigated in 1907 when you started irrigating? A. They were.

Q. Were you just casually, or quite well acquainted with Joe McDonald?

A. I was very well acquainted with him.

Q. And what was Mr. Deschamp's name, Ed?

A. Yes.

Q. Were you acquainted—well acquainted with him? A. I was.

Q. Were they irrigating small tracts or quite large tracts of land under this McDonald-Deschamps Ditch?

A. Well part of them were irrigated more than others. [373]

(Testimony of George Buckhouse.)

Q. Do you remember at that time during the years 1907, 1908 and 1909, how much of the Frank Fiddler allotment was being irrigated?

A. I imagine about 20 acres of it.

Q. And what would you say, what portion of the William Deschamps allotment was being irrigated?

A. Well I think most all of it.

Q. And what would you say about the Ed Deschamps allotment, how much of that land?

A. There was about 40 acres of that, as near as I can remember.

Recross Examination

By Mr. Simmons:

Q. Referring again to the Emma Magee allotment, Mr. Buckhouse, you testified that approximately 30 acres of that allotment was gravel?

A. Gravelly subsoil.

Q. What portion of the allotment—on what portion of the allotment was the gravelly portion?

A. Why about 30 acres of it.

Q. Well was it on the southeast corner of this allotment?

A. Well it run practically through the middle of the allotment—very near.

Q. What is the character of the soil on that allotment?

A. It is clay and gravelly subsoil in the middle and then the other is clay subsoil.

(Testimony of George Buckhouse.)

Q. You testified that of the Edward Deschamps allotment there were 40 acres irrigated?

A. About that—I couldn't say exactly how much.

Q. Was it pasture or grain? [374]

A. Well both pasture and grain.

Q. And could you approximate how much pasture and how much grain there was?

A. Well I couldn't say, particularly, how much.

Q. Well then you would say that approximately half of that allotment was——

A. —I would, yes.

Recross Examination

By Mr. Smith:

Q. How long has it been since you have been intimately acquainted with those lands?

A. Oh I am over that country a good deal all the time.

Q. When did you quit farming up there?

A. In 1911.

Q. With respect to the various figures and acreages that you have given us did you make any effort or anything of that sort to estimate any of these acreages about which you testified?

A. No I didn't.

Q. And the figures that you have given us are simply your recollection of those——

A. —Just an estimate, yes.

(Testimony of George Buckhouse.)

Q. And when were those estimates made?

A. Well at the time I was farming there.

Q. That was back in 1911? A. Yes.

Witness Excused.

B. W. ALEXANDER,

one of the defendants, was called as [375] a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name is B. W. Alexander?

A. Yes sir.

Q. And you are one of the defendants in this case? A. Yes sir.

Q. And do you now own and occupy the allotment referred to as the Duncan McDonald allotment? A. Yes sir.

Q. And when did you acquire that piece of property? A. In 1933.

Q. And you have obtained that from whom?

A. From a man named McMilligan.

Q. Have you been living on this land since 1933?

A. Yes sir.

Q. And I believe your land is located east and above what is known as the Pablo Feed Canal?

A. Yes sir.

(Testimony of B. W. Alexander.)

Q. Is it possible for you to obtain any irrigation water out of the government ditch? A. No sir.

Q. Well do you use irrigation water up there?

A. Yes sir.

Q. Where do you get that water?

A. I get it out of what is known as the McDonald-Deschamps Ditch.

Q. How much of that 80 acres of land do you irrigate?

A. Well I have been irrigating, I should judge, about 40 [376] acres.

Q. Is that all ploughed up or do you use some on your pasture?

A. No—some pasture—there are 20—there is about 20 acres of that has been ploughed.

Q. About 20 acres of ploughed land you use water on and about 20 acres of pasture?

A. Yes, the meadow land.

Q. The McDonald-Deschamps Ditch forks on your place doesn't it?

A. Well it doesn't—yes there is a ditch taken out from there that goes to Stevens and other people.

Q. And crosses the Pablo Feed Canal in two flumes? A. Yes sir.

Q. Well do you know how much water you use on this 40 acres of land? A. No sir.

Q. You have never measured it?

A. No sir there is no way of measuring it.

(Testimony of B. W. Alexander.)

Q. Do you waste any of that water that you use for irrigation purposes?

A. No sir not a bit.

Q. Well if any of that water gets away from you when you are irrigating where does it go to?

A. Goes into the canal, the government ditch.

Q. The canal runs practically parallel with your piece of land does it?

A. Yes, sometimes within a couple or 300 feet.

Q. And does all of the water that gets away from you, if any does, go into this Feeder Canal?

[377]

A. Yes sir.

Q. How did you happen to purchase this particular piece of land?

A. Well I was looking for a home and I was told by Mr. Angus McDonald about this place——

Mr. Smith: Object to that as hearsay.

Q. No, I asked you how you happened to pick out this particular piece of land to purchase?

A. Well I went up to look at it and it was what I thought I wanted so I bought it.

Q. Well did the fact that there was water on this piece of land influence you any?

A. Yes sir I wouldn't have bought it if there hadn't been.

Cross Examination

By Mr. Simmons:

Q. Did you know that land had a Secretarial right—one of these private water rights?

(Testimony of B. W. Alexander.)

A. Well I don't know as I knew it at the time, no.

Q. Not at the time you purchased the land?

A. No.

Q. But you did know subsequently?

A. Well yes I did.

Q. And did you know the amount of your Secretarial right? A. Not at that time.

Q. Well do you know it now? A. Yes.

Q. That is—I am referring to Plaintiff's Exhibit 8—the Duncan McDonald allotment, the Secretary granted, according to this portion of the exhibit, the right to 16.8 acres. You stated you had irrigated 40 acres of it on the allotment at [378] this time? A. Yes.

Mr. Smith: We have no cross examination.

Witness Excused.

C. L. McVEY

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name please?

A. Clarence McVey.

Q. Where do you reside?

A. At Northport, Washington.

(Testimony of C. L. McVey.)

Q. What business or occupation are you in?

A. Immigrant Inspector in the Naturalization Service at Northport.

Q. For the United States government?

A. Yes sir.

Q. Is John Hazel related to you?

A. He is my father-in-law.

Q. Where is Mr. Hazel this morning?

A. He is in the hospital.

Q. He got hurt?

A. He was injured yesterday evening.

Q. Do you now own what was formerly known as the Florence McDonald allotment?

A. I do.

Q. When did you purchase that?

A. In August of 1934. [379]

Q. From whom?

A. The Beckwith Mercantile Company of Saint Ignatius, Montana.

Q. And have you lived on that land at any time since you purchased it? A. I have not.

Q. Who occupies it now?

A. My father-in-law, John A. Hazel.

Q. And he is still living on that land?

A. He is.

Q. You have been on the land have you?

A. I have.

Q. Will you tell the Court how you happened to purchase that particular piece of land?

(Testimony of C. L. McVey.)

A. Well I was looking for a piece of land for a home for my father-in-law and for an investment.

Q. At the time that you purchased this land did you know or believe that the land had a private water right or some free water? A. Yes sir.

Q. Did that fact influence you at all in purchasing this piece of land? A. It certainly did.

Q. I will ask you if the purchase price that you paid, or the consideration you paid for this place was made partly in payment of the water?

A. I would say that I gave more for the land, due to the fact—or was willing to give more for the land—due to the fact that it had free water.

Q. And can you tell us—has your father-in-law, Mr. Hazel, [380] been using water for irrigation purposes on this land since he has been occupying it? A. He has.

Q. And still is using it down to the present time?

A. I presume so, although I haven't been on the ranch for a matter of a year.

Q. Up to that time had he been?

A. Yes he had.

Q. Of course I don't suppose you know how much water he is using?

A. No sir I have no idea.

Q. And have you any knowledge how many acres he is irrigating?

A. I would estimate it to be between 30 and 40 acres.

(Testimony of C. L. McVey.)

Cross Examination

By Mr. Simmons:

Q. What investigation did you make as to the water rights to this land when you purchased it?

A. None, other than that Mr. Beckwith informed me there were water rights—free water rights on that land.

Q. Did he state that they were Secretarial rights?

A. I don't recall—he said there were certain free water rights.

Q. So you relied on Mr. Beckwith's statement?

A. I did.

Q. You asked no lawyer as to whether—about these so-called free water rights? A. No sir.

Q. Made no further investigation?

A. No; I believe that he showed me an abstract showing [381] that there were certain water rights, or, as I recall it, a warranty deed that might have mentioned free water rights.

Q. But no lawyer passed upon——

A. —No sir——

Q. —the type of water right on the land?

A. (No answer)

Q. Did you make any inquiry of the irrigation office or the Saint Ignatius office that there was such an irrigation?

A. I was in a terrible hurry when I bought the land as I had to leave the following day, and I had no time for investigating.

(Testimony of C. L. McVey.)

Mr. Smith: Your Honor, I now move that the defendant Clarence McVey be substituted as party defendant in this action in place of Beckwith Mercantile Company; apparently, unbeknown to me, this land has been sold, and apparently this person now owns the land, and the pleadings all run to the Beckwith Mercantile Company.

Mr. Wallace: May I ask another question?

The Court: Yes.

Redirect Examination

By Mr. Wallace:

Q. You purchased this land on a contract?

A. Yes sir.

Q. About the 22 of August, 1934?

A. Around that time.

Q. When did you acquire your warranty deed to it? Have you the deed with you?

A. I have the deed—September 1939, I think.

Q. I will show you the defendants' proposed exhibit 34 and will ask you what that is, Mr. McVey?

[382]

A. A warranty deed to——

Q. —From whom?

A. From the Beckwith Mercantile Company of Saint Ignatius, Montana, to Clarence L. McVey and Lillian L. McVey, husband and wife as joint tenants.

Q. Is your wife Lillian L. McVey still living?

A. She is.

(Testimony of C. L. McVey.)

Mr. Wallace: I believe we will offer this exhibit in evidence.

The Court: You say your father-in-law's name is John A. Hazel?

The Witness: Yes sir.

Mr. Smith: We have no objection.

The Court: Admitted without objection.

Mr. Wallace: I might state to the Court that this deed is dated the 22 day of August, 1934, and was recorded in Lake County on August 16, 1939.

The Court: The exhibit will be considered read into the record; any party may refer to it at any time.

Defendants Exhibit 34, the instrument referred to, and so identified, was then received in evidence and considered as read into the record, and the said exhibit is on file with the original exhibits in this case.

Mr. Smith: I now move, your Honor, that Clarence L. McVey and Lillian L. McVey be substituted as parties defendant in the place of the defendant Beckwith Mercantile Company.

Mr. Simmons: We join with the interveners in the motion. [383]

The Court: Under what theory? Your theory constantly has been that you are merely trying to enjoin somebody from doing something—we will let the record stand the way it is. Any further cross?

Mr. Simmons: No further cross.

Mr. Smith: We have no cross.

Witness Excused.

THEODORE KNUTSON,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name please?

A. Theodore Knutson.

Q. Is your wife's name Edna I. Knutson?

A. Yes.

Q. You are a defendant in this action?

A. Yes sir.

Q. You now own and occupy what is known as the Mary C. McDonald allotment number 559?

A. I do.

Q. Are you purchasing that tract of land?

A. Yes.

Q. From whom?

A. From Percy and Mary C. Meeks.

Q. When did you contract to buy that land?

A. October 8, 1934.

Q. When did you move on the land? [384]

A. October 12, 1934.

(Testimony of Theodore Knutson.)

Q. And have you and your wife been occupying it ever since? A. We have.

Q. Are you farming it? A. Yes.

Q. How much of that land is cultivated?

A. Well according to the Soil Conservation there is 32.2 acres, I think.

Q. And do you use any irrigation water on that?

A. I do.

Q. Thirty acres? A. Yes I do.

Q. Do you use any irrigation water on the balance of the land? A. Yes on the pasture.

Q. How much pasture land do you irrigate?

A. Oh approximately 20 acres.

Q. Then you have been using water on about 50 acres? A. About 50 acres.

Q. How long have you been using the water on that 50 acres? A. Since May, 1935.

Q. Where do you get this water?

A. I get it from the Reclamation and some from the McDonald Deschamps Ditch.

Q. Do you know, Mr. Knutson, how much water you are using on this land?

A. I wouldn't know.

Q. Do you waste any water?

A. Not so far.

Q. Well does any of the water get away from you? [385]

A. Well when it gets to the end of the field, the last ditch, you are bound to run it over.

Q. Where does that waste water go to?

(Testimony of Theodore Knutson.)

A. Down the natural draw.

Q. Well where does the water drain, to, from or through this draw?

A. Down to Mr. Stevens.

Q. On his land? A. Yes.

Q. Is it picked up anywhere by a ditch later or does it go on his land?

A. Well if he don't use it it runs down the draw down to D Ditch.

Q. That is the government ditch? A. Yes.

Q. Now how did you happen to purchase this particular piece of land, Mr. Knutson?

A. Well I was dry land farming for some time and dried out seven years and I thought I would get an irrigated farm and I wanted some right to water.

Q. Where were you formerly located?

A. North of Great Falls 65 miles.

Q. Dry land? A. Yes sir.

Q. And you came into Lake County to get irrigated land? A. Yes.

Q. There is a branch or lateral from the McDonald-Deschamps Ditch on to this piece of land?

A. Yes.

Q. Was that ditch there when you purchased the land? [386] A. It was.

Q. How much did you pay for this land or agree to pay? A. \$2500.00.

Q. Now what was your understanding about this water when you purchased the land?

(Testimony of Theodore Knutson.)

A. Well from the understanding that there was plenty of water there, there were ditches on the place, Reclamation water and free ditches.

Q. Did you understand you had some free water? A. I did.

Q. Did that fact influence you at all in purchasing this piece of land? A. It did.

Q. Was part of the purchase price that you agreed to pay for this land in payment of the water also?

A. Well about half of it, I figured.

Cross Examination

By Mr. Simmons:

Q. Do you know how many acres you have under the government project?

A. Well 27.2 I believe.

Q. And the balance is under the McDonald-Deschamps Ditch? A. Supposed to be.

Q. At the time you purchased this land did you make any investigation as to the validity of your so-called free water or private water rights?

A. Well the agent I bought it from told me about it, and after he left I went down to Mr. Stevens, my neighbor on the west, and I asked him, and he told me that there was free water for the place. [387]

Q. Did he mention any Secretarial rights?

A. No he didn't, he just said there was free water for the place.

(Testimony of Theodore Knutson.)

Q. Did you request any information from the project office at Saint Ignatius?

A. Not at the time, no.

Q. You have talked to them later?

A. Yes sir.

Q. And did they advise you that you have Secretarial rights to your land?

A. Well 3.2 acres, I believe it was.

Q. You are, in fact, irrigating 50.2, 27.2 of which is served by the government project, is that right?

A. What is that?

Q. 27.2 of which are served by the government project ditches—that is, 27.2 of this 50.2 acres are irrigated by government project, and the balance out of the McDonald-Deschamps Ditch?

A. Well I use both waters at the same time.

Cross Examination

By Mr. Smith:

Q. Do you have any way of knowing how many acres you irrigate with water that comes from the McDonald-Deschamps Ditch?

A. No I haven't exactly.

Q. Well do you cover more than 3.2 acres with that water? A. Yes I do.

Q. And approximately how much more do you cover?

A. Well everything that is dry, that needs it.

Q. Well I say approximately how much more, could you tell me? [388]

(Testimony of Theodore Knutson.)

A. Well something around 18—20 acres—22—somewhere in there, I imagine.

Witness Excused.

And thereupon at 10:50 o'clock a. m. recess was had for ten minutes, at the expiration of which time the trial was resumed.

P. W. SORENSON,

one of the defendants, was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Give us your name please?

A. P. W. Sorenson.

Q. And where do you live?

A. Ronan at the present time.

Q. You are one of the defendants in this action?

A. Yes sir.

Q. Did you at one time purchase the Frank Fiddler allotment?

A. I did.

Q. You still own that land ?

A. Yes sir.

Q. When did you buy that, Mr. Sorenson?

A. Well I think it was '28.

(Testimony of P. W. Sorenson.)

Q. 1928? A. 1928.

Q. And you purchased it from whom?

A. Frank Fiddler. [389]

Q. Frank Fiddler. Did you live on that land for a while? A. Yes I did.

Q. For how long? A. Four years.

Q. When did you first move on it?

A. It was in 1930 I think, if I remember right, 1930.

Q. You lived there four years after that?

A. Yes.

Q. And have you lived on the land since?

A. No I have not.

Q. Has it been occupied by some other person?

A. Yes.

Q. You have a renter?

A. I have a renter, yes.

Q. And has the same renter been on that land since 1935, that is there now? A. No.

Q. Who rented it first?

A. Why it was Fred Wallace was on there three years.

Q. And after he occupied the land who occupied it? A. George Wyman.

Q. And is the land rented now?

A. No it isn't; I farm it myself, some of it.

Q. Now how did you happen to purchase this land?

A. Oh I liked the place and there was a water right on it and little creek going through it.

(Testimony of P. W. Sorenson.)

Q. What is the name of that creek?

A. June Creek.

Q. That goes through this allotment does it?

A. Yes. [390]

Q. You say there is a water right on the land?

A. Yes.

Q. What did you understand about this water right?
A. Yes.

Q. What did you understand about this water right at the time you purchased the land?

A. Well I understood that there was a water right for it—water coming through the McDonald-Deschamps Ditch.

Q. You mean private water right.

A. Yes private water right.

Q. Or under the government ditch?

A. Out of the McDonald Ditch.

Q. The McDonald-Deschamps Ditch?

A. Yes.

Q. Did that fact influence you at all in the purchase of this piece of land?
A. Yes it did.

Q. Did you look around on the reservation for a piece of land before you bought this piece?

A. Why no I didn't.

Q. During the time you occupied the land did you use any of this water out of the McDonald-Deschamps Ditch?
A. Yes.

Q. For irrigation purposes?
A. Yes.

Q. During the four years you were living on it how much of this allotment did you irrigate?

(Testimony of P. W. Sorenson.)

A. Well I irrigated all that could be irrigated.

Q. And about how much can be irrigated?

A. Fifty-five acres. [391]

Q. And you irrigated practically all of that 55 acres?

A. Yes I irrigated 55 acres.

Q. Wholly with water from the McDonald-Deschamps Ditch?

A. Yes sir—well no, part from the regular Mission water.

Q. Do you know how many acres you irrigated with water from the McDonald-Deschamps Ditch?

A. No I couldn't tell exactly.

Q. Do you know how many acres you irrigated with water from the government ditch?

A. No I didn't keep track of it. I used both at the same time.

Q. Had the men who had been renting that land from you since they were there been using water on it, do you know?

A. Yes they had been using water.

Q. Do you know whether or not they have been irrigating practically all of this 55 acres?

A. Yes they have.

Q. And I believe you stated you are farming the land this year?

A. Yes.

Q. 1939. And have you used any water on the land yet this spring?

A. No.

Q. You expect to?

A. Yes.

Q. Have you any way of knowing how much

(Testimony of P. W. Sorenson.)

water you used on this land during the time you were living on it?

A. No—well it took $2\frac{1}{2}$ or 3 feet—was sufficient for an acre, to irrigate it.

Q. About what, $2\frac{1}{2}$ to 3 acre feet? [392]

A. Yes, $2\frac{1}{2}$ to 3 acre.

Q. And was that about the amount of water you used?

A. Yes that was about what I used to get a fairly good crop.

Q. Now during the time you were living on this land did you waste any of this irrigation water?

A. No I didn't, only there might be a little, you know, when you get to the end of the field, there is bound to be a little waste, you know.

Q. There is bound to be some waste?

A. Oh yes, you can't help it.

Q. What becomes of that waste water that goes off your place?

A. Well some of it goes to June Creek and some of it goes in a natural draw.

Q. Well now whenever that goes into June Creek what becomes of that water?

A. Well it runs into the ditch or F—Canal F.

Q. That is the government ditch?

A. Yes the government ditch.

Q. And you said some of it goes where else—into a draw?

(Testimony of P. W. Sorenson.)

A. Yes on the north side, it goes into a draw and then goes into the canal too.

Q. That goes into the government canal?

A. Yes.

Q. So that none of the waste water or the water that is wasted on your place, actually is wasted?

A. No.

Q. Do you need this water for irrigation purposes up there to irrigate this farm?

A. Oh yes absolutely. [393]

Q. Why?

A. Oh it is—it would be dry, of course, you know.

Q. Well I mean can you raise better crops with water? A. Oh yes.

Q. Does the land need irrigation?

A. Yes the land needs irrigation.

Cross Examination

By Mr. Simmons:

Q. You say you purchased the land in 1928?

A. Yes sir, so far as I remember.

Q. Did you make any investigation as to water rights at that time? A. I did.

Q. And what were they—what investigation did you make?

A. Well I went to the court house and it showed the whole place was under the ditch, that is, McDonald-Deschamps Ditch, and the Mission it showed 18 acres and seven-tenths, I think.

(Testimony of P. W. Sorenson.)

Q. Well isn't it 29.7, the correct acreage under the project that you pay charges on? A. Yes.

Q. And——

A. —29.7 is what I am paying on now.

Q. And the balance is out—in fact you are irrigating 55 acres—and the balance is irrigated under the McDonald-Deschamps Ditch? A. Yes sir.

Q. Did your investigation show the number of acres to which your private water right attached?

A. Well yes it did.

Q. At the Mission office? [394]

A. Yes, Mr. Moody told me.

Q. I mean the right under the McDonald-Deschamps Ditch—was there anything in your investigation from which you determined you had a right to take water out of the McDonald-Deschamps Ditch?

A. Yes I investigated that I had a right to take water out of the ditch.

Q. That is, you investigated at the project office at Saint Ignatius? A. Yes.

Q. Did they tell you how many acres you could irrigate out of the McDonald-Deschamps Ditch?

A. Yes.

Q. Do you remember how many acres they told you you had a private right to?

A. Eighteen and some-tenths.

(Testimony of P. W. Sorenson.)

Cross Examination

By Mr. Smith:

Q. Did you measure the water that you use on your land?

A. No, I have no way to measure it.

Q. You don't have any way to—any weirs?

A. No the government never put any gate in for the government water or anything.

Q. Do you have any weirs to measure the water you take out of the McDonald-Deschamps Ditch?

A. No.

Q. And how do you calculate the amount of water which you use on the land in those years?

A. Oh well I kind of estimated what I got from the Reclamation, when I got water from there, you know, when they [395] sent me down a foot and a half, why I kind of figured it that way, how much it would take to irrigate an acre.

Q. And when they sent you down a foot and a half—what do you mean by that?

A. A foot and a half of water.

Q. That would be cubic foot and a half?

A. Not an acre foot—what they call a foot of water or a foot and a half—I don't know how they measure it.

Q. Now then how do you translate cubic feet of water into acre feet? A. I don't know.

Witness Excused.

AVERY A. STEVENS,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name please?

A. Avery Stevens.

Q. And you are one of the defendants in this action? A. I am.

Q. You live up in Lake County?

A. Lake County, Saint Ignatius.

Q. Do you now own what was formerly known as the William Deschamps allotment, number 781?

A. I do.

Q. When did you purchase that land?

A. I believe it was in 1929. [396]

Q. In 1929?

A. Yes in 1929; I went on it in 1928.

Q. Did you rent it that year?

A. I rented it one year.

Q. And then purchased it?

A. And then purchased it.

Q. Now I believe you also own the north 30 acres of the Edward Deschamps allotment, number 783, do you not? A. I do.

Q. And did you rent that portion at the same time you rented the other allotment?

A. I did.

(Testimony of Avery A. Stevens.)

Q. And did you purchase this 30 acres at the same time you purchased the 80? A. I did.

Q. All one transaction?

A. All one transaction.

Q. And have you been living upon and occupying and farming this 110 acres ever since 1928?

A. I have.

Q. And are so living there now?

A. Still there.

Q. Mr. Stevens how do you use water on this 110 acres? A. I do.

Q. Where do you get the water from?

A. McDonald-Deschamps Ditch.

Q. Do you get any government water?

A. I do.

Q. And have you been using water from the McDonald-Deschamps Ditch ever since you have been living on this land? [397] A. I have.

Q. Are you able to tell the Court how many acres of the 110 acres you irrigate with water from the McDonald-Deschamps Ditch?

A. Well I have irrigated it all excepting just an acre or something where the house is and the barn, practically the whole 110 acres.

Q. From this McDonald-Deschamps Ditch?

A. I have.

Q. Have you used some water from that ditch every year since you have been there?

A. I have.

(Testimony of Avery A. Stevens.)

Q. Why do you use some government water?

A. Well, chances are I would be a little bit behind and want a little bit bigger head, wanted to do it a litter faster, maybe, was a reason, and as they have me charged with some water I thought maybe I might use a little to catch up.

Q. You are charged with some government water?

A. I am.

Q. Well, whether you use it or not?

A. Yes sir.

Q. How much did you pay for these 110 acres?

A. I believe I gave \$6000.00.

Q. At the time you purchased the land did you make any investigation relative to the private water?

A. I did.

Q. Well what understanding, if any, did you have about this private water at the time you bought it?

A. Well it showed that I had some free water right belonging to the land, I believe from the Reclamation, and also in Polson. [398]

Q. Well did the fact that this—some of this land had a private water right influence you in purchasing it?

A. It did.

Q. Could you have purchased land elsewhere on the reservation under the government ditch at a much cheaper price?

A. I could have.

Q. Do you know how much water you have been using on this land during the time you have been irrigating?

A. No I couldn't say.

(Testimony of Avery A. Stevens.)

Q. You didn't measure it? A. No.

Q. And did you have any experience with water before you went on to this land? A. I have.

Q. Where? A. Well, Southern Idaho.

Q. Now in irrigating this 110 acres do you waste any water? A. No sir.

Q. How—what parts of that ranch are cultivated—do you raise crops on?

A. I don't just get that.

Q. How many acres do you farm?

A. Farm it all.

Q. You don't use any of it for pasture?

A. Oh I got a little pasture but all that is irrigated.

Q. Well how many acres do you actually farm and raise crops on?

A. All of it I guess but about 17 acres I got pastured; the rest of it is all farm land.

Q. Do you irrigate the pasture land? [399]

A. I do.

Q. Now is it necessary that you irrigate this land that you raise crops on? A. Yes sir.

Q. Can you raise better crops with water?

A. I do.

Q. Do you waste any water in irrigating this land of yours?

A. No sir I don't believe I do.

Q. Well you are the only person that knows—do you intentionally waste any water on it?

A. No sir.

(Testimony of Avery A. Stevens.)

Q. Well in irrigating land does some get away from irrigators? A. Oh yes.

Q. That is a sort of a natural waste, is it?

A. Yes sir.

Q. Now if any of this water gets away from you and is wasted, where does this waste water go, from your place?

A. Goes in Lateral B, in the government ditch.

Q. So that it is picked up in the government B Lateral ditch? A. Yes.

Q. And none of it actually goes to waste?

A. I don't know what they do with it then.

Q. But it goes into the government ditch?

A. It goes into the government ditch.

Cross Examination

By Mr. Simmons:

Q. What part of this 110 acres is covered by the private water right? [400]

A. I use it all when I need it.

Q. In other words you don't know what private rights you have? A. No sir.

Q. You say you made an investigation of your private rights at the time you purchased this land; where did you make this investigation?

A. At the Reclamation Office in Saint Ignatius.

Q. Did they advise you at that time as to how many acres were covered in that private right?

A. 11.9, I believe at that time.

(Testimony of Avery A. Stevens.)

Q. And do you know how many acres you have under the government project on which you are paying charges?

A. Well the balance of it.

Q. You would say you are paying charges, then, on practically 100 acres, to the government?

The Court: Is that a fair subtraction?

Mr. Simmons: Well I will say 98.1 acres to the government.

The Court: Let's straighten that out. How much were you told was under the free ditch?

The Witness: I believe 11.9, if I am right.

Q. 11.9 was under the McDonald-Deschamps Ditch? A. Yes.

Q. Now as to the balance—you testified you were irrigating 110 acres? A. Yes.

Q. As to the 98.1 acres you are irrigating, is that under the government project and do you pay charges on that acreage? A. I do. [401]

Mr. Simmons: That's all.

Cross Examination

By Mr. Smith:

Q. In irrigating, Mr. Stevens, is it possible to put more water on the lands than the lands will absorb, so that a portion of it will go down in the subsoil, from which you get no beneficial use?

A. More water than the land takes?

Q. Yes. A. Is that the question?

Q. Yes sir? A. No sir.

(Testimony of Avery A. Stevens.)

Q. That is, you can't, on any given piece of land, put more water on that—put more water on to the land itself—than the land will hold?

A. I don't believe so.

Q. Is there such a thing as seepage of irrigating water down through the subsoil and down into the earth?

A. Seepage through subsoil?

Q. Yes sir, down into the earth?

A. I think so.

Q. Do you know whether or not any of the water used for irrigation seeped down into the earth and is lost in that manner?

A. I do not.

Redirect Examination

By Mr. Wallace:

Q. Let me ask you—when you say there is a private water right to 11.9 acres, did that apply only to the William Deschamps 80 or to the whole 110? [402]

A. Well it applied to the whole 110, I believe, at the time it should have, I don't know if it showed that, but the 110 acres had that much water right.

Mr. Simmons: Now, for the Court's information, that just applies to the William Deschamps—he has another water right.

Mr. Wallace: I think the witness is confused.

The Court: That's what I thought he said he had.

Q. Isn't it true that the 11.1 private water right applies only to the William Deschamps 80?

(Testimony of Avery A. Stevens.)

A. I think so.

Q. And that the 62.8 acres, that allotment is under the government ditch? A. Yes sir.

Q. Now then on the Edward Deschamps allotment consisting of 80 acres of which you own the north 30, there are, according to the records, 10.3 acres of private water rights on the whole 80?

A. I think so.

Q. So that you own some portion of that 10.3 acres on the 30 acre tract? A. Yes.

Q. And about—I will ask you if this is true—and about 24.1 acres of this 30 is under the government assessment? A. I believe so.

Q. Now Mr. Pierce owns the south 50 acres, doesn't he? A. Yes.

Q. Of this 80? A. Yes sir.

Q. Mr. Stevens, can this 30 acres that you own of the Edward [403] Deschamps allotment be irrigated from the government ditch?

A. It cannot.

Q. Why not? A. There is no ditch built.

Q. Has there ever been a government ditch from which this 30 acres could be irrigated?

A. No.

Q. And there is not, even today?

A. No sir.

Recross Examination

By Mr. Simmons:

Q. Mr. Stevens on this 30 acres located on the Edward Deschamps allotment, which you say is

(Testimony of Avery A. Stevens.)

under the government project, to which there is no ditch to deliver water through, or through which to deliver water, have you ever made any demand for water from the government—have you ever asked them to construct a ditch so they could deliver water?

A. No sir.

Recross Examination

By Mr. Smith:

Q. Do you know, Mr. Stevens, what the—how much water, that, the Secretary, allocated to the north 30 acres?

A. I do not.

Q. To the Edward Deschamps allotment?

A. Of free water right?

Q. Yes, free water?

A. Well there was some I believe, but I couldn't just state the amount.

Q. Well if I were to tell you it was .8 of an acre in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 17, Township 19 North, Range 19 West, [404] would that be in accordance with your recollection?

The Court: Well he says he doesn't know.

Mr. Smith: That's all.

Witness Excused.

MEIL C. PIERCE,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Give your name to us, please?

A. Meil C. Pierce.

Q. You are one of the defendants in this action?

A. Yes sir.

Q. Where are you living now?

A. I am living in the town of Saint Ignatius.

Q. I believe you own the south 50 acres of the Edward Deschamps allotment, number 783?

A. I do.

Q. Is that correct? A. Yes sir.

Q. When did you contract to purchase that land?

A. In March 1926.

Q. And you bought it on a contract did you?

A. Yes sir.

Q. Afterwards acquired a deed to the property?

A. Yes sir.

Q. Now did you live on that land for a while?

A. I lived on that land continuously until a little over [405] two years ago.

Q. When did you first go upon the land to live?

A. I went there in April, the first day of April.

Q. Of what year? A. 1926.

Q. And you lived there continuously up until a couple of years ago? A. Yes sir.

(Testimony of Meil C. Pierce.)

Q. Did you farm that 50 acres during the time you were living on it? A. Yes sir.

Q. And how much of the 50 acres is cultivated?

A. There is around between 38 and 40 acres there cultivated.

Q. What is the balance, pasture land?

A. Pasture.

Q. And did you use irrigation water on the cultivated portion? A. On the pasture?

Q. Yes.

A. I have used very little water on the pasture because of the fact that my pasture is covered with—well, little springs, and it don't require any more water, the biggest part of it.

Q. Springs rise on your pasture land?

A. Yes.

Q. And have you used irrigation water on the land that is cultivated? A. Oh yes.

Q. And why?

A. Because I can't grow any crops to amount to anything [406] without it.

Q. The land requires water to raise crops, does it? A. Yes sir.

Q. Where do you get this water that you irrigate your land with?

A. I get it from the McDonald-Deschamps Ditch.

Q. And had you used water from that ditch during all of the time you farmed this land?

A. Yes sir.

(Testimony of Meil C. Pierce.)

Q. Do you know how much water you used, Mr. Pierce?

A. No that would be hard to tell as we have no measuring device there and the only way that I could judge at all of that, there has been a few times that I have used some Reclamation water and had them turn it there, and with that it is hard to judge because there is no ditch running from the A Canal down to my place, it is just turned in a draw there, June Creek, and whenever there is any amount of water turned down there it spreads all of the country there and I can only use about so much of it.

Q. Well where does this water come from that gets into June Creek?

A. It comes from right straight east of my place there.

Q. Well does it rise east——

A. —It dries up in the summer; it just runs a little while in the spring, snow water.

Q. That isn't water out of the government ditch?

A. Oh no.

Q. It rises there east of your place?

A. But however, at the present time that flume has been taken away from there, I think some eight or ten years ago; [407] I don't remember just what time it was that—probably Mr. Sperry could tell that—at the time they had that meeting, Mr. Moody was here, and that June Creek water was turned

(Testimony of Meil C. Pierce.)

from Lish over to the McDonald place up there above the ditch.

Q. Was that a flume across the——

A. —There was a flume across the ditch.

Q. Which ditch? A. The A Canal.

Q. Is the A Canal what is called and known as the Pablo Feed Canal?

A. Yes, that is, the upper canal.

Q. Is this land of yours now rented?

A. Yes sir.

Q. Some farmer living on it? A. Yes sir.

Q. What is his name? A. Antone Klick.

Q. Is he using water to irrigate the land?

A. Yes sir.

Q. How much did you contract to pay, and pay for this 50 acres? A. \$5,000.00.

Q. Did you make any investigation with reference to the private water on this land when you bought it?

A. Not as much as I should have done; I was given to understand that it had private water for the whole place; the creek run right close to my place and I was given to understand, when I bought it, that there was private water, but later I talked with Mr. Moody, who was the project engineer at the time, and he told me that there was only 8.3 acres [408] private right, but all of the old timers around there told me that that was a mistake, that they knew that; they told me when that had been irrigated and the ditches gotten out for that piece

(Testimony of Meil C. Pierce.)

to irrigate that, but afterwards for that they only want to allow me 8.3 acres.

Q. Well when you had the talk with Mr. Moody was that after you bought the land?

A. Yes it was after I bought the land.

Q. And at the time you bought the land did you understand from these old timers you say—

A. —Yes sir, and from Bill Larson, the man that was handling the lands, a real estate man.

Q. Bill Larson at that time was a representative of the Northern Pacific Railway Company?

A. Yes—he represented the Vermont Loan.

Q. Vermont Loan and Trust Company?

A. Yes sir.

Q. May I ask you again, at the time you bought this land did you understand that you had a private water right for all of the land?

A. Yes, when I bought it.

Q. Well if you had not so understood it would you have purchased this piece of land?

A. I don't think that I would have given that price.

Q. Well what is the value of the improvements on that land?

A. Oh I would judge around \$1500.00, and that was plenty high.

Q. At the time you bought this land could you have purchased a piece of land under the government ditch, well improved, for less money? [409]

A. Well I bought another 80 acres of land down

(Testimony of Meil C. Pierce.)

adjoining Tom Wald's; I gave \$1200.00 for the 80, because there was no private water right on it.

Q. And that 80 you bought adjoining Tom Wald's, or near Tom Wald's——

A. —It joins Tom Wald's.

Q. Was that under the government ditch?

A. Yes sir.

Q. And when did you buy that piece of land?

A. I bought it in 1929 but I didn't get the transfer until 1930.

Q. And at the time you bought the 50 acres could you have purchased land in that vicinity, that didn't have a private water right but that was under the government ditch, at a cheaper price?

A. Yes, much cheaper; I spent two days with Bill Larson going all over the Flathead looking for a place, and I told him that I wanted a place where I could work and have a small little dairy farm and be a home, that I wasn't able to handle anything very big, and we looked at places from Arlee to Polson, and drove in there and he told me the conditions of the place and the place, and I told him I would take it.

Cross Examination

By Mr. Simmons:

Q. Do you have any of your lands under the government project system?

A. It is all under it.

Q. I mean this particular 50 acres, is that under

(Testimony of Meil C. Pierce.)

the operation and maintenance charges of the government?

A. On about 27 acres of it, I think. [410]

Q. Do you get any water from the government ditches?

A. I have been getting a little private water and lately there has been a few times that I have got a little water from the Reclamation.

Q. But you actually irrigate your land with the waters you receive from the McDonald-Deschamps Ditch, is that not right?

A. Most of it, yes.

There was no cross examination by Mr. Smith, and the

Witness Excused.

BERT MYERS NELSON,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Your name is Bert Myers Nelson?

A. Yes sir.

Q. And you are one of the defendants in this action? A. I am.

Q. You own and possess what is known as the Oro Deschamps allotment 784? A. I do.

(Testimony of Bert Myers Nelson.)

Q. How long have you owned that land?

A. I have owned half of it since 1926, and I bought the south 40 in April of 1939.

Q. You bought the first 40 in 1926?

A. Yes.

Q. Now did you move upon that forty at that time?

A. I moved on—I bought his 20 acres—I moved one of the [411] buildings on what is now the Joe Turnidge 80, and that other 40 in the north 40.

Q. Of the Oro Deschamps?

A. Of the Oro Deschamps.

Q. Well did you start farming this Oro Deschamps allotment or this 40 in 1926? A. I did.

Q. And have you farmed it ever since?

A. Yes.

Q. And have you been farming the south 40 since you owned that? A. Yes.

Q. Have you been using water to irrigate that land with? A. I have irrigated it all, yes.

Q. During the time you were irrigating the north 40 of the Oro Deschamps allotment where did you get the water?

A. Well I got most of it from the government ditch.

Q. Where did you get the rest?

A. From Post Creek — McDonald-Deschamps Ditch.

Q. Well how many—do you know how many acres of this 40 you irrigated from the McDonald-Deschamps Ditch?

(Testimony of Bert Myers Nelson.)

A. Well I irrigated all I could with the water that come down there.

Q. How much is that?

A. Oh I would say it must have been around 12 acres.

Q. Are you sort of on the tail end of this McDonald-Deschamps Ditch?

A. I am at the very end of it, yes sir.

Q. And you only have what water is left after the men ahead of you have used out of that ditch?

[412]

A. That's it exactly.

Q. Well has there ever been enough water coming down the McDonald-Deschamps Ditch to irrigate all of the 40?

A. Well that south forty I bought last spring, there has never been any Reclamation water used on it.

Q. You irrigate that south forty?

A. The whole south forty is irrigated, yes.

Q. Where do you get the water for that?

A. Well that has come from McDonald Lake ditch and June Creek.

Q. You get them both, do you?

A. Yes, in fact the water from McDonald Lake comes down June Creek.

Q. Why do you irrigate that land?

A. Because it isn't worth farming without it.

Q. You have to irrigate it to raise crops?

A. To raise crops that is worth farming.

(Testimony of Bert Myers Nelson.)

Q. Now have you ever wasted any water on this eighty? A. I can't waste any water.

Q. Why not?

A. Well my place—C Canal runs right through it and there is no water—it don't get to my place until it is in C Canal, except some of it in the northwest end of Tom Wald's ditches that might run into C Ditch there.

Q. Yes, B Canal runs through your place?

A. B Canal crosses the north end of my place.

Q. And C Canal below?

A. Lower on my place.

Q. And any of this water that gets away from you it is picked up by both these canals? [413]

A. From only C Canal.

Q. Have you any way of knowing how much water per acre you have used on this land?

A. You mean on this forty?

Q. Yes.

A. No I have no way of telling.

Q. Well on either forty?

A. Well I know what I use from the Reclamation any year, I use all the water I can get.

Q. You get some from the Reclamation?

A. Yes sir, that is, for all except this south forty of the Oro Deschamps.

Q. The north forty of the Oro Deschamps land, part of it is under the government ditch?

A. Yes sir.

Q. I will ask you if 29.7 acres, is that about the amount out of the government ditch?

(Testimony of Bert Myers Nelson.)

A. Well I can't exactly remember the tenths, but that sounds about what I'm under the impression it was.

Q. And you are charged under the government ditch for that number of acres, or about that?

A. Yes.

Q. Whether you use it or not? A. Yes sir.

Q. Now about how much did you pay for this whole eighty?

A. The Oro Deschamps eighty?

Q. Yes.

A. Well in the deal it figured out better than \$6000.00; I bought one forty and then last spring I bought this other forty—this Oro Deschamps I figure stands me a little [414] better than \$6000.00.

Q. And at the time you purchased this land did you make any investigation as to whether or not it had a private water right?

A. No further than from the man I bought it from.

Q. Who did you buy it from?

A. My uncle, Bert Lish.

Q. What understanding did you have about this water at that time?

A. Well he told me he had water on his entire forty and I could get water on mine—that is, to the Oro Deschamps eighty.

Q. Did you at any time make any investigation or have any conversation with the Reclamation officials?

(Testimony of Bert Myers Nelson.)

A. Not until after I thought of buying this south forty of the Oro Deschamps land.

Q. Well did the fact that you understood this north forty had private water rights——

A. —I understood it had it, yes.

Q. Did that fact influence you at all in purchasing this land?

A. Well if I hadn't had that I wouldn't have bought the land.

Q. What about the south forty?

A. Well he held that as his home—he owned 160, and he held that as his home and wouldn't sell it until last spring.

Q. When you purchased that did you have any understanding?

A. As to water?

Q. Yes.

A. Before I bought it I went down to the office and asked about private water on that forty and I was told that had [415] 35 acres on it at the time when I saw them and I supposed I had 35 acres, because he never run any water and I didn't inquire as to where this water come from but after this intervention I learned I only had seven and two or three-tenths acres on that forty, the same as the other forty, and I went down to find out about the balance of the water and there was 29 and some tenths went out of June Creek.

Q. What did you say about this 35 acres?

A. Well that was supposed to have that private water on it.

(Testimony of Bert Myers Nelson.)

Q. Where did you get that information?

A. From the man I bought it, and the Reclamation office.

Q. Did you ever receive any letter from the project engineer concerning this private water right?

A. No sir.

Q. Concerning this 35 acres?

A. No sir.

Q. What relation did you say Bert Lish is to you?

A. My uncle.

Q. Do you know whether or not he received a letter concerning this 35 acres?

A. No I don't—well now I may have received a note from Mr. Sperry, or some of the officers, after I was down there and inquired as to this other water right and where it came from; there was some investigation to be made and they did send a note of what they found there in the office, the same evidence they give me when I was there.

Q. I show you defendants' proposed exhibit 35 and I will ask you if you know what that is?

A. Well that was in my—in the deed that I bought the place. there was a copy—either this or a copy of it—it [416] was in the first—yes, it shows what has been decreed by the Secretary of the Interior—

Q. —Well to whom is this letter addressed?

A. Well it was to the defendants in this case I suppose.

Q. And do you know who signed this letter?

A. I think Mr. Gerharz.

(Testimony of Bert Myers Nelson.)

Q. Is that Mr. Gerharz the engineer?

A. Mr. Gerharz the engineer, yes sir.

Q. It is addressed to several people, is it?

A. I presume so, yes, it was on with the deed I got to the forty.

Q. Let me ask you to look at it and see?

A. Yes this is addressed to all the defendants.

Q. And there is a red check mark with a name there?

A. The name of Lish, the man from whom I bought the forty.

Q. And you got this letter along with——

A. —The deed to the forty.

Q. Which you purchased from Lish?

A. Yes.

Q. And this letter relates to the private water on the Oro Deschamps allotment? A. Yes.

Mr. Wallace: We offer defendants' proposed exhibit 35 in evidence.

Mr. Simmons: No objection.

The Court: It will be admitted.

Defendants' Exhibit 35, being the instrument referred to, and so identified, was then received in evidence and is on file with the original exhibits in this cause. [417]

(Testimony of Bert Myers Nelson.)

DEFENDANTS' EXHIBIT 35

Department of the Interior
U. S. Indian Irrigation Service
Flathead Irrigation Project

St. Ignatius, Montana July 12, 1935

Mr. Bert Nelson;

Mr. Bert Lish;

Mr. Avery Stevens;

Mr. P. W. Sorenson;

Mr. M. C. Pierce;

Mr. B. W. Alexander;

Mr. Roy McVey;

Mr. Theo. Knutson;

Mrs. Caroline McKeever;

Present Owners of Deschamps-
McDonald Ditch.

Dear Sir (or Madam):

By decree of the Secretary of the Interior on November 15, 1921, 35.3 acres of the Ora Deschamps allotment, which is now being irrigated by you, were declared to have a valid and subsisting water right from Post Creek to the extent of 2 acre feet per acre per annum, or a total of 70.6 ac. ft. per annum. None of the remaining area of this allotment was declared to have a private water right from any source.

The following regulation was promulgated by the Secretary in respect to the regulation of all such decreed rights:

(Testimony of Bert Myers Nelson.)

“All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.” [545]

It is apparent that there will occur a serious shortage of water this year on all divisions of the Flathead Project which will result in considerable damage by reason of crop losses to many water users. To minimize this loss as much as possible every available drop of water must be properly utilized. In regard to these private water rights such as in this case, no greater amount of water must be diverted and used than was allowed by the Secretary nor must any other than the designated acreage be irrigated with this water.

I, as Project Engineer, have been designated by the Secretary of the Interior to act as Water Commissioner for the Flathead Indian Reservation, and I have been accordingly instructed to regulate the distribution of water among the various users under any particular ditch, and to enforce the decrees and orders of said Secretary.

(Testimony of Bert Myers Nelson.)

In line with the above, you are requested to have constructed by August 1, 1935, a suitable headgate at the point where your private ditch taps Post Creek and at some practicable place a proper measuring box, weir or other appliance for the measurement of the water flowing in your ditch which can be inspected and measurements taken by you and employees of this Service, with the purpose of determining that no more water is diverted for the irrigation of your lands than allowed, as above set forth, by the Secretary.

You will note from the above cited authorization that in the event of your refusal to comply with this request, it is my duty as such Water Commissioner not to apportion or distribute any water through your ditch. [546]

I trust that you will fully cooperate with me in this proposition. Water shortage is a serious problem with every farmer on the project. These steps are most essential to equitably distribute the available waters.

You will find this office prepared to give you all reasonable assistance.

In the event, however, that this request is ignored and no action taken by you, I shall be compelled to immediately submit this matter to our District Counsel in order that appropriate legal action may be taken against you.

Very truly yours,

/s/ HENRY GERHARZ

Project Engineer. [547]

(Testimony of Bert Myers Nelson.)

Mr. Simmons: No cross examination.

Mr. Smith: No cross examination.

Witness Excused.

THOMAS WALD,

one of the defendants, was called as a witness on behalf of the defendants, and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. State your name? A. Tom Wald.

Q. And where do you live?

A. I live on Post Creek.

Q. In Lake County?

A. In Lake County, yes.

Q. You are a farmer up there?

A. I guess that's what they term it, yes.

Q. Do you own the James Waymack allotment, number 689? A. I do.

Q. And you also own the Emma M. Magee allotment, number 688? A. I do.

Q. How long have you owned those two pieces of land?

A. Why I think it is since early spring, 1917.

Q. Did you buy both of them at the same time?

A. I did.

Q. From whom?

(Testimony of Thomas Wald.)

A. Why if I recall right I think the deeds was in Mrs. Magee's name, both of them.

Q. Emma Magee? [418]

A. I think so, yes.

Q. Is she the wife of Andy Magee that testified this morning? A. She is.

Q. Well did you move upon that land?

A. I did yes.

Q. And you still own and farm the whole 160 acres? A. I do.

Q. Do you cultivate the whole 160 or do you use some of it for pasture?

A. Well I rotate as much as I can.

Q. Well is it all cultivated or do you use some for pasture land?

A. It can all be cultivated, yes, practically every inch of it.

Q. I'm asking you, have you had it all under cultivation? A. I have.

Q. And you rotate—part one year and part the next? A. Yes.

Q. Is that the way you do?

A. That is the way I try to practice it.

Q. Now under what ditch is this land located?

A. You mean private ditch?

Q. Yes? A. Magee-Minesinger Ditch.

Q. Well since 1917, during the time you have been living there, where did you get the water to irrigate this land?

A. Well the biggest part of it from the Magee-

(Testimony of Thomas Wald.)

Minesinger Ditch, although I have exchanged water with the Reclamation quite a number of times. [419]

Q. Well do you know how much water you use there actually, in irrigating this land—have you measured it, I mean?

A. I have never measured it, no, but I am supposed to be using plenty.

Q. Well do you know—have you ever measured it?

A. No I haven't.

Q. Did you ever irrigate lands before you moved upon this land?

A. No sir never have.

Q. Well where do you get the water to irrigate this land from, other than the Magee-Minesinger Ditch?

A. I don't get water from any other source, except one year, I think, the ditch washed out, and I bought some water from the Reclamation that year.

Q. Well have you ever used any water to irrigate this land from any other springs or——

A. —Yes quite a number of years.

Q. Where did you get that water from, Mr. Wald?

A. Well it empties into B Canal southeast of my place, I believe on the Garipey place, and some on the Latto place, and I think some on the George Sansome place.

Q. Is there any government canal that goes through your land?

A. Yes sir.

Q. When you—generally speaking, I mean?

(Testimony of Thomas Wald.)

A. Generally speaking, the government ditch goes from the south to the north—well it angles, it cuts 160 acres—I will use these two sections here for the 160—I would say it come in approximately up here.

Q. Where is that? [420]

A. In the southeast corner on the Waymack eighty, and it runs along in here and circles back and forth and down in this here it comes off, it cuts across the road here, I guess, and circles down around here and comes out on the northwest corner of the Emma Magee eighty at approximately the same distance from this corner here; I will say that really the biggest head of it would be below Canal C.

Q. You can see your place on the large scale map marked with the two eighties and the south eighty in pink and they are supposed to represent your two eighties?

A. Yes—well you can see that for yourself—this would be north?

Q. Yes.

A. Well then this map is wrong because it never comes below the line of that Emma Magee eighty any place.

Q. You mean this canal marked Mission, here, enters on to one of your pieces of land?

A. It comes in right through here, approximately, and goes over on to the—and it never goes below this land here.

(Testimony of Thomas Wald.)

Q. Which allotment lays to the west?

A. That is Emma Magee's.

Q. And you mean the canal never leaves that allotment until it angles through the north end?

A. No it don't.

Q. So the location of this canal is slightly off?

A. Very slightly off—it is approximately all right, though.

Q. Now where does this water rise, the spring water you were speaking of?

A. Well it is up in this section here some where.

[421]

Q. And you are pointing to about section 20?

A. Well I suppose it is up in here—it empties into this Mission feed.

Q. Well in irrigating your land do you waste any water deliberately?

A. Not deliberately, no.

Q. Well you waste some, naturally?

A. You naturally will, when you are irrigating lands——

The Court: Is water wasted when you can't prevent its going away?

Mr. Wallace: I don't know.

The Court: Neither do I.

Mr. Wallace: You can call it waste, and yet it is not a deliberate waste.

The Court: A waste, or is it a necessary loss.

Q. Is this land of yours, 160—cut up by the government ditch and by the highway?

(Testimony of Thomas Wald.)

A. It is, yes, the road runs right through the center of the two eighties.

Q. Between the two eighties?

A. Yes. And there are a lot of short slopes both ways along the road there, and a lot of different short runs on the ridges.

Q. And when you have those short runs—do you mean short runs for water?

A. For water, yes.

Q. Can you irrigate where there are short runs as easily as—or conserve the water as well, as where there are long runs for the irrigation of water?

A. No you can't; you take on the later spots, where the [422] land is left, where you have to run it approximately two hours to do much irrigating, and you are bound to have some run-off there, or quite a little, you might say.

Q. Have you ever taken any steps to conserve water up there on your land, in the vicinity of your land? A. I have.

Q. What did you do about it?

A. Well it was for years there that Mr. Crow——

Q. —And what years were those?

A. That was when I first settled in there—Mr. Crow and Mr. Moody they urged me to make use of this spring water in the spring of the year especially.

Q. Who was Mr. Crow?

A. He was the project engineer there before Mr. Moody.

(Testimony of Thomas Wald.)

Q. And then he was followed by Moody?

A. Yes sir.

Q. And what did he say you should do about conserving it?

A. He urged me to make use of that water and leave my water up in McDonald Lake, as that could be saved and stored up there while their water went to waste.

Q. Well where did you get this spring water?

A. They got three turnouts in Mission C and I used to get it through them.

Q. You take it out of the government ditch?

A. Yes.

Q. After it had gone into the government ditch?

A. Yes sir.

Q. And when you were using that water was it necessary then for you to be using your private water out of the Magee-Minesinger Ditch? [423]

A. Oh sometimes later in the year but this was mostly in the spring of the year I irrigated, I imagine, a week or ten days before the majority of people do.

Q. Well how many years did you use this spring water out of the government ditch and in the spring time and leave the water up in the Post or Lake McDonald Reservoir?

A. Why I imagine practically every year from the time Mr. Crow was engineer until Mr. Moody was transferred.

Q. Well how many years was that, Mr. Wald?

(Testimony of Thomas Wald.)

A. Well it must have been——

Q. —Well was it all one year or several years?

A. Oh quite a number of years, yes.

Q. Well while you were using that water from these springs that was being wasted into the government canal was it necessary for you to be using the water out of the Magee-Minesinger Ditch?

A. It would take the place of part of what would come out of—ordinarily come out of the Magee-Minesinger Ditch, yes.

Q. Well now then after Mr. Moody was transferred who was put in, as you remember, as project manager? A. Mr. Gerharz.

Q. Well did you use any of this waste water during the reign of Mr. Gerharz?

A. I did not.

Q. Why not?

A. Well Mr. Moody served notice on me to leave it alone.

Q. Did you ever talk to Mr. Gerharz about trying to conserve this water and use it?

A. I did; I got a letter from him—it was a very nice letter, indeed—he told me there was going to be a water [424] shortage and asked me to cooperate with them and save as much of this water as I possibly could because it was badly needed over the rest of the project; so I went and made myself acquainted with him, and I asked him if he was familiar with that part of the country out my way, and he said he wasn't, and I told him

(Testimony of Thomas Wald.)

about these springs and also told him about—that I had the practice of using a certain amount of water below C—out of C—that is, when I was irrigating, from the canal, and if it was all right with him that I could go ahead and use it, that it would be quite a saving to the rest of the project, and he told me he didn't think it could be done; he said "If you do it once you will always have to do it, and it would cause trouble;" so I told him that was all right, it wouldn't take me thirty minutes to turn in my own water, but, I said "You take a different attitude from what Mr. Moody and Mr. Crow did;" so he said "Well," he said, "if you don't like it," he said, "why don't you sell and move out."

Q. Well were you——

A. —So I told him that I had a good little wife and home and three children, and I was trying to pay for my place and make a home for them, and it wouldn't be very handy for me to move right then.

Mr. Smith: We object to any further answer along this line as not responsive.

The Court: It shows the attitude of the management, telling a man to get out of his home.

Q. Were you permitted then to use any of this spring water that was wasted into the canal, to use it on your land during the time Mr. Gerharz was manager? [425]

A. No I wasn't.

Q. Well then where did you get the water?

(Testimony of Thomas Wald.)

A. I got it out of the Magee-Minesinger Ditch.

Q. Well let me ask you—when you were irrigating from the Magee-Minesinger Ditch, or when you got through irrigating with the water from the Magee-Minesinger Ditch, did you go, then, and shut that ditch down, or would the water run all the time?

A. No I would shut it down when I got through.

Q. Do you——

A. —I imagine on an average of every ten days or so.

Q. Let me ask you one other question about the other defendants, when they were using the McDonald-Deschamps Ditch, does that water run full head continuously, or do they shut it down when they are through irrigating?

A. It seems to be shut off and on, because I go right across their ditch every time I go up there to shut mine off or open it up.

Q. Well now then when you are using water to irrigate on your east eighty, towards the mountains, east from the Mission Canal, what becomes of any waste water that gets away from you?

A. It all runs into C Canal.

Q. Well now did Mr. Sperry follow Mr. Gerharz as project engineer——

Thereupon at the hour of 12:07 o'clock p. m. of said day recess was had until 2:00 o'clock p. m. of said day, when the trial was resumed.

Q. Mr. Wald, later on, when Mr. Sperry became

(Testimony of Thomas Wald.)

the project engineer, did you have any conversation with him relative [426] to this waste spring water that was wasted in the B Canal? A. Yes I did.

Q. Briefly, what was that conversation?

A. Well I asked him if he was familiar with that part of it, and I also told him that I had had permission to take water out of C Canal, and again he said he wasn't; but however he said he would look into it very carefully and write me, but so far I haven't heard anything more of it.

Q. And from then, from the date of that conversation, until the present, have you had any permission to use this water out of C Canal?

A. No I haven't.

Q. Now do you know what becomes of this spring water that wastes in the C Canal?

A. Well in the early part of the spring why it is all wasted.

Q. What becomes of it—where is it wasted?

A. Well there is a waste gate between my place and Marion Deschamps that is usually open in the spring of the year.

Q. And is that a waste gate in the C Canal?

A. That is a waste gate in the C Canal, yes.

Q. And the water goes out of that waste gate?

A. Yes and runs through Post Creek.

Q. Tell the Court whether or not there is any portion of your land that has a gravelly subsoil?

A. Yes there is a little portion of it.

Q. Approximately how many acres would you say?

(Testimony of Thomas Wald.)

A. Oh I didn't measure it but I judge between 25—35 acres.

Q. Does that land with gravelly subsoil require more water than the balance of your land? [427]

A. Yes it does.

Q. If properly irrigated?

A. It takes a very large head to get across it, otherwise it will sink.

Q. Now what price did you pay for this 160 acres? A. I paid \$10,000.00 for it.

Q. And that was in 1917?

A. Yes that was in 1917.

Q. At that time was that figure a large price or a small price for 160 acres?

A. It was considered the largest price that had ever been paid for any land around there at that time.

Q. And what, if anything, influenced you to pay that price for that 160 acres?

A. On account of the private water rights.

Q. Did you make any investigation with reference to the private water rights?

A. Yes I did; I lived in the Valley about 15 months before I bought this place; I inquired in regard to construction charges to land, down at the Reclamation Office, and they informed me that construction charges would be between sixty and sixty-five dollars an acre, so I was trying to get away from that by buying a place with the private water rights.

(Testimony of Thomas Wald.)

Q. And the reason you purchased this land, then, you say, was on account of this private water right?

A. That was the sole reason.

Q. What understanding did you have at the time you purchased this land with reference to the free water?

A. That it had free water on it.

Cross Examination

By Mr. Simmons: [428]

Q. You say that you were familiar with your private water rights or so-called Secretarial rights at the time you purchased this land?

A. Well in a way I did; before I bought the place I employed a well educated Indian that had helped survey this Valley at the time it was surveyed; he was working for Stanley Searce at the time.

Q. What I was getting at, on the Emma M. Magee allotment, which you now own, do you know what the Secretarial right is?

A. I do now, yes.

Q. What is it?

A. It is supposed to be eighty acres.

Q. That is a right for each acre on the allotment?

A. That's what I understood for the secretarial right, for each acre-feet, yes sir.

Q. And on the James Waymack what is your Secretarial right?

A. I think 52.3 acres, if I remember right.

(Testimony of Thomas Wald.)

Q. Did you, Mr. Wald, ever attempt, at the time, to limit your diversion of the amount allocated you by the Secretary?

A. No I don't believe I have.

Cross Examination

By Mr. Smith:

Q. You say that you don't waste any water from your land that you could possibly save, is that correct? A. I try not to, yes.

Q. As a matter of fact a considerable amount of water does flow from your land into Mission C, doesn't it?

A. Yes quite a little when I irrigate above the canal.

Q. You irrigate a part of your land which lies below [429] Mission C Canal, don't you?

A. I think the biggest portion of the two eighties lies below C Canal.

Q. And whatever water is wasted from the portion lying below Mission C wouldn't go into Mission C, would it? A. No it don't.

Q. Where does it go?

A. Well it goes down the creek to Cramers and Bushmans and I guess to Hilton and Smith.

Q. They call that Poison Ivy or Poison Oak Creek? A. I wouldn't know.

Q. And do you know where that creek empties into Post Creek?

A. Well it must be right close to the highway

(Testimony of Thomas Wald.)

there, the road that runs east and south there at the Post Creek store.

Q. Now there is an east and west road between your land—there is a culvert across that road, is there not? A. Yes.

Q. And why was that culvert put in?

A. For waste water to go across the road.

Q. From where?

A. From my place—most of it comes from Mr. Pierce's eighty there.

Witness Excused.

Mr. Wallace: I would like to call Mr. Sperry for a couple of questions.

The Court: Very well.

GUY L. SPERRY

was called as a witness on behalf of the [430] defendants, and having already been duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you tell us approximately how many of these so-called Secretarial private water rights there are on the reservation?

A. There are around 300.

(Testimony of Guy L. Sperry.)

Q. It is over 300 isn't it?

A. I think it is over 300; I can't give the exact figure; it is something like that.

Q. How long is the Pablo Feed Canal Mr. Sperry?

A. Beginning from Dry Creek you mean?

Q. Yes the length?

A. It must be twenty—somewhere around twenty-six—twenty-eight miles.

Q. What is the estimated percentage of loss to the water needs now?

A. As a matter of fact there has never been anything that we could definitely determine; I would say possibly forty percent—forty-five percent; it is a figure that is practically impossible to determine; there is a considerable loss, at any rate, that is, for the amount; if you take the water at the beginning of it and run it clear through of course there will be a lesser loss; the farther up the line you get the more seep.

Mr. Simmons: If the Court please I would like to ask Mr. Sperry a question, for the record, upon a matter with regard to the James Waymack allotment, at this time.

The Court: On your own case or on cross? [431]

Mr. Simmons: It is on cross; that is, it is in answer to certain questions the Court asked me in regard to Plaintiff's Exhibit 10, wherein the exhibit sets forth that very little of this land, in fact less than an acre and a half was irrigated in 1914, and

(Testimony of Guy L. Sperry.)

The witness testified it was practically the entire eighty, was irrigated; I can do it now or later, as the Court wishes.

The Court: It isn't cross examination at this time?

Mr. Simmons: No it isn't cross, it is really rebuttal.

Cross Examination

By Mr. Simmons:

Q. In giving the figures forty-five—forty to forty-five—loss in the Pablo Feed Canal does that mean that would be the loss of water which was turned in at Dry Creek and uniformly runs north to the Pablo Reservoir?

A. That's right.

Q. Other streams come into the Pablo Feed Canal between Dry Creek and the Pablo Reservoir?

A. Numerous streams, yes.

Q. And as those streams go north would the amount of loss on them tend to diminish as the distance to the Pablo Feed Canal?

A. The loss in those streams would be correspondingly less as they approach the Pablo Reservoir.

Q. And it is for that reason that it is rather difficult to make any real estimate of the total amount, or the total percentage of loss in that water carried in the Pablo Feeder?

A. It is impossible without very extensive and very expensive investigation, because of the fact

(Testimony of Guy L. Sperry.)

that water being put in the canal there is run out of the canal—there are diver- [432] sions from the canal, water turned down to some of the streams, and there are springs along the canal, so that it is all but impossible to get an average loss in the Pablo Feed Canal.

The Court: What causes that loss?

The Witness: The loss in seepage; in any soil where the ground is at all porous there is quite a lot of the water goes in the ground; in the course of the number of miles there is a lot of water sinks down into the subsoil and is completely lost; the evaporation accounts for some, in extremely hot weather, and all ditches do suffer a greater or smaller percentage of loss.

The Court: Yes but is it usual for it to be forty or forty-five percent of loss?

The Witness: It isn't extremely uncommon at all, water that is transported 20 miles or 25 miles, it is very common, and maybe more than that in many ditches.

The Court: Could that water be saved if it were used nearer the point of origin?

The Witness: A considerably larger amount could be.

The Court: What is the need for transporting it the distance it is carried?

The Witness: The need for transporting it in this case is to take the water from the source of largest supply to the source of smaller supply.

(Testimony of Guy L. Sperry.)

The Court: That is, the land closer to the source of supply, needing irrigation, could use it all?

The Witness: No sir they couldn't use it all.

The Court: Could they use a considerable quantity—say fifty-five percent? [433]

The Witness: They could use fifty-five percent, possibly, in the course of quite a few miles, but not just close to the source; there would be a pretty good mileage before they could.

The Court: Any further questions?

Cross Examination

By Mr. Smith:

Q. Is it your practice to use the water—take the water to the lands from the closest source of supply?

A. That's right, the closest available source of supply.

Witness Excused.

J. D. PHILLIPS

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. Will you state your name?

A. J. D. Phillips.

(Testimony of J. D. Phillips.)

Q. And where do you live?

A. Saint Ignatius, Montana.

Q. For how long have you lived there?

A. Twenty-eight years.

Q. You live on a ranch? A. Yes sir.

Q. You operate that ranch? A. Yes sir.

Q. Have you had any experience in the use of irrigating waters? [434] A. Yes sir.

Q. How long have you had experience in using water—irrigating water?

A. Well I have had experience the last 39 years.

Q. Where did you use irrigation water prior to your coming to the reservation?

A. My first experience was on Shields River.

Q. Where is that?

A. Eastern Montana—empties into the Yellowstone near Livingston. Next, in the Bitter Root Valley.

Q. And that is south of Missoula?

A. Yes sir.

Q. And then where?

A. Next on the reservation.

Q. And has that experience of 39 years, of yours, been continuous?

A. It was about four or five years during that time that I wasn't farming.

Q. Aside from that four or five years——

A. ——Yes, four or five years during the 39.

Q. The nature of it——

(Testimony of J. D. Phillips.)

A. ——That is, extensively—I used some water, but it was on small tracts.

Q. You have used water extensively for irrigating purposes for approximately 39 years, with the exception of four or five years, is that right?

A. Yes.

Q. Now you own a ranch on the reservation?

A. I am trying to pay for one there.

Q. Now where is your ranch located with respect to the [435] defendants' lands?

A. It is about two miles or a little better, south.

Q. Well are you acquainted with the defendants' lands? A. Yes sir.

Q. Have you been on those lands?

A. Yes sir.

Q. Once or twice, or many occasions?

A. Well some of them I have been on quite a few times; I put up hay on some of them; some of them I haven't been on so much of late years.

Q. Well let me ask you, is your ranch about the same character of soil as the ranches of the defendants? A. Practically so.

Q. Are you about as close to the mountains as they are? A. Yes sir.

Q. Now what, if you know, what has been the largest amount of water that you have been able to use on your land, Mr. Phillips, in acre feet, if you know?

A. Well in the good old days——

Q. ——When was that?

(Testimony of J. D. Phillips.)

A. That was in the "teens", 19—and—well I will say possibly '19, the best was, immediately after they put in the A Canal, I used the most water.

Q. And how much had you then—how much did you use?

A. Well if I remember right, according to one of the project engineers, Mr. Engels—, he was there a number of times and measured the water—I think the record will show that I have got as high as four acre-feet from the land—I mean from the project.

Q. And did you use all of that four acres?

[436]

A. Yes sir.

Q. Did you ever use any other water at that time? A. I used the private water too.

Q. Had you some private water?

A. Yes sir.

Q. How much?

A. Well I think the Secretarial rights claimed 40 acres.

Q. And how many acre-feet?

A. Two acre-feet I believe.

Q. And did you use that two acre-feet?

A. Yes sir.

Q. At the same time you were using the four acre-feet from the government ditch?

A. Yes.

Q. On the same land? A. Yes sir.

Q. You mean to tell us you have used as high as six acre-feet then?

(Testimony of J. D. Phillips.)

A. Well I think Mr. Engel said I had used seven acre-feet.

Q. Well when you——

A. ——There was nobody using much water in there and there was lots of it and I used my own water and all the water I could get out of the canal.

Q. Well when you used that seven acre-feet, or thereabouts, what kind of crops did you raise?

A. I had dandy crops.

Q. And could you use all of that water beneficially without wasting any of it?

A. Yes sir—I will modify that to a certain extent—we wasn't as careful then about wasting water as we have been [437] in the last several years, owing to the fact that there was plenty of it and no one was using it—I say very few were using it.

Q. Do you know how much water you have been using on your ranch during the past four or five years, Mr. Phillips?

A. Well it was—now when I said this here about so much water, that there was land that I had leased, because my own land, I didn't use any of the project water on that: this here all was leased, that land right below me.

Q. Joins you? A. Yes sir.

Q. During the past four or five years how much water have you used in irrigating that land?

A. Oh that there it runs from possibly a little less than two feet up to as high as three, maybe.

(Testimony of J. D. Phillips.)

Q. Can you use three feet of water beneficially on your land without wasting it?

A. Yes and a whole lot more.

Q. You could? A. Yes sir.

Q. Tell the Court how much water, Mr. Phillips, that you could use on your land, beneficially, without wasting it any more than the natural waste?

A. Well I don't think that I can work that place—now you understand the full 160 acres, that is the ground I am speaking of?

Q. Yes.

A. Keep it green, from the time I got the seed started, until fall, with less than four feet.

Q. Four acre-feet? [438]

A. Four acre-feet—that would be very—you would have to be very careful.

Q. Mr. Phillips is it possible to irrigate a ranch such as yours, or any similar ranch, without wasting some water?

A. No, not if you are irrigating it all.

Q. Why is that?

A. Well what are you going to do when you get to the lower——

Q. ——Tell me?

A. Well when you get to the lower end of your farm, if you are irrigating that, some of the land you have got to soak it up, and some will run off in spite of it.

Q. It isn't of course—or is it possible to pick

(Testimony of J. D. Phillips.)

that water up and take it back up to the high land?

A. No you can't run water up hill.

Q. So there is some natural waste even though you are careful?

A. Well as far as that particular land is concerned it is gone off that but it isn't wasted, they got a canal below that they pick it up, and I don't consider that it is wasted.

Q. Well now are you familiar enough with the lands of the defendants to state generally, Mr. Phillips, what, in your opinion—or what amount of water their lands require to properly irrigate them?

A. Well of course they have some places over in among the defendants that is seeping land, dry, that has a subsoil that when the top soil gets wet the water will run along on the subsoil and come up, they have some of that that this other land that I speak of don't have—outside of that why it is practically the same. [439]

Q. Practically the same as what?

A. As my land.

Q. And what then, will you say, generally speaking, what does the land—what amount of water does the land of the defendants require for proper irrigation?

A. I don't think they could keep the ground, the stuff green on it throughout the growing season for much less than four acre-feet.

(Testimony of J. D. Phillips.)

Q. And is it good practice and policy for farmers to keep their pasture and land green?

A. Well your pasture is the most important part of your farm and any time you let your ground burn it hurts it, in fact in the good old days when there was lots of water the project used to encourage the people to irrigate their stuff until after the grain was off—and why not—the stuff will grow up, and you can easily use that for a turn-out as a fattener or the stock put into it, and we used to do that—we didn't have so many wild oats, either—that has a tendency; anything that grows in good moisture will grow where it is irrigated—the ground is ready for the next spring, you plough your ground and put your crop in and it is much better.

Mr. Simmons: No cross examination.

Cross Examination

By Mr. Smith:

Q. How many acres of your land are under the project system?

A. Well I have 70—it used to be 78 acres—I believe the record shows now 72 or 74 and some tenths.

Q. Seventy-five, approximately, acres under the project system? [440] A. Yes.

Q. How much water, if you know, was delivered for an acre-foot, per acre, for that 75 acres, last year?

A. Well last year we might not have used—I

(Testimony of J. D. Phillips.)

think it was two foot, last year, and there was 40—
about 40 acres that was summer fallowed.

Q. So there you used two acre-feet per acre, or
150 acre-feet, on 35 acres of land, is that right?

A. How is that?

Q. You say you have 75 acres under the project
system? A. Yes sir.

Q. And last year you summer fallowed 40 acres?

A. I think the soil conservation showed some-
thing like 40 acres.

Q. So you actually cultivated and raised crops
on 35 acres? A. Yes sir.

Q. And you had delivered to you under the proj-
ect system 150 acre-feet of water?

A. Well if my memory serves me right I didn't
get to use quite all of it; I might have but I wouldn't
say, but it was practically all.

Q. And so far as your best recollection goes
then you used all of that water on 35 acres?

A. Yes sir.

Q. Now then in addition to that land you have
some land with the so-called private rights?

A. Yes sir.

Q. And where does that land lie?

A. Well that lies south of this other land about
a mile.

Q. And out of what stream or ditch do you get
the water [441] for the private?

A. Well that is called Dry Creek or sometimes
Ashley Creek.

Q. And how many acres did you irrigate with
the waters from that stream?

(Testimony of J. D. Phillips.)

A. Well I irrigated about 200 acres.

Q. And how much water did you get out of that, do you know?

A. Well it would be more or less of an estimate, I didn't measure it—no measuring device.

Q. Do you think you are capable of estimating it with a reasonable degree of accuracy?

A. Yes sir.

Q. How much is your estimate?

A. Well the way I would estimate that, the time I irrigated it—however, I didn't do much of the irrigating last year—haven't the last few years been as actively irrigating as in earlier years—my boy irrigated it; when I irrigate that, every time I irrigate it takes about six inches—that would be probably 250 acre-feet.

Q. You used 250 acre-feet for 200 acres down there, then?

A. Something like that.

Q. And what kind of crops did you produce on the 35 acres that you were irrigating out of the project system?

A. Well that there was in timothy and alsike, and I cut that for seed.

Q. Did it make a good crop?

A. Yes sir.

Q. Would it have made a bigger crop if you had had more water?

A. No I don't think it would last year because that's [442] about all you can get when you use it

(Testimony of J. D. Phillips.)

for seed—that there ripens in July—I done very well last year.

Q. So you used that 150 acre-feet of water on that 35 acres, up to about July?

A. No I had water the whole season.

Q. Now then what kind of crops did you raise on the 200 acres you have got under the private ditch?

A. Well I also used some project water from the project on that too.

Q. How much of that 200 acres?

A. Well I don't use any of that on the crop—I used that after the crop was cut—I had a good crop.

Q. You had a good crop on the 200 acres under your private ditch? A. Yes sir.

Q. And you brought that up on irrigation with water from the private ditch, is that right?

A. Yes.

Witness Excused.

GEORGE H. BECKWITH

was called as a witness on behalf of the defendants and having been first duly sworn testified as follows:

Direct Examination

By Mr. Wallace:

Q. What is your name?

A. George H. Beckwith.

(Testimony of George H. Beckwith.)

Q. How old are you? A. Sixty-eight.

[443]

Q. And when did you first come to Western Montana? A. 1886.

Q. And have you been in Western Montana ever since then? A. Yes sir.

Q. Where did you come to when you first came to Montana? A. Missoula.

Q. How long were you located in Missoula?

A. Sixteen years.

Q. Where did you go to then?

A. Went to Saint Ignatius.

Q. That is up on the former Flathead Indian Reservation? A. Yes.

Q. That was—— A. ——1902.

Q. Have you been located at Saint Ignatius ever since 1902? A. Yes.

Q. What kind of business have you been in?

A. In the mercantile business; I was first there as a licensed Indian trader.

Q. By whom were you licensed?

A. By the Commissioner of Indian Affairs.

Q. And you established a store there did you?

A. Yes sir.

Q. And was that store then succeeded by your own store—I mean——

A. ——I bought out a business there and operated under my own name until 1910, and then under the name of the Beckwith Mercantile Company since then.

Q. Are you acquainted with Charles Sanders?

(Testimony of George H. Beckwith.)

A. Yes sir. [444]

Q. I will ask you if you had any business dealings with him?

A. Well in 1904, on September first, Charley Sanders opened an account with me, that was open until October tenth that same year; during that time he traded with me and bought powder and supplies of various kinds, and on October 18th the account was paid by Joseph Deschamps; together with Mr. Sanders, I had occasion to look that up in my old records, and I found that that was the case.

Q. You still have the records? A. Yes.

Q. And they are available in the court now?

A. Yes.

Q. Did you know the Deschamps and the McDonalds? A. Yes.

Q. Did you know what Mr. Sanders was doing at the time he was running this account with you?

A. No, only that he was doing some work for Mr. Deschamps.

Q. Did you ever visit or go upon the reservation prior to the time you went there to locate in 1902?

A. Yes I had been there several times, after I came to Missoula.

Q. About what year did you first go up on the reservation?

A. Why I know I was there in '93; I was previous to that, too—I was there in the '90's—in the late '80's.

(Testimony of George H. Beckwith.)

Q. Now when you were there did you go through the Jocko Valley? A. Yes.

Q. And any further up on the reservation?

A. Yes we was up to Polson and across the lake on the boat, and then I camped, summer camped on Flathead Lake in the [445] '90's, one year.

Q. On these first trips, Mr. Beckwith, before you located on the reservation, what did you notice about the Indians—were there any Indians there?

A. Yes, the Indians had homes along the creeks and along the mountains, practically all their homes were close to wood and water, and there were no farms out from the creeks or from the mountains—the prairie land was all open range.

Q. Well when you located on the reservation in 1902 what condition did you find the Indians in—I mean by that, were they still located along the creeks? A. Along the creeks.

Q. And what if anything were they doing with respect to farming?

A. They were engaged in stock raising, and quite a few of the big Indians that were farming grain and hay and pasture.

Q. Any of them using any water to irrigate with?

A. Yes a few; the Deschamps and the McDonalds had a ditch out of Post Creek, as I remember, and they were using it in a small way, but later they were advised by the superintendent to file any water rights that they had, and I remember Mr. Bel-

(Testimony of George H. Beckwith.)

lew was the Indian Agent at that time, about that time, soon after I went there, and——

Mr. Smith: May I interrupt you just a moment—did you hear the conversation between Mr. Bellew and the various Indians with whom he had dealings?

The Witness: Well I did hear they were written—and how I come to know about it, I happened to be a notary public and many of them brought their filings—the filings were [446] prepared mostly in the Agent's office—and were brought to me to be acknowledged before me; and at that time a number of them took out ditches and filed on the water.

Q. Were you here in Western Montana at the time that the Flathead Indians were moved on to the Flathead Reservation?

A. I was in Western Montana; I remember the time that the Army officials moved quite a number of Indians through Missoula to the Flathead.

Q. Is it a fact, Mr. Beckwith, that the Flathead Indians were rather slow to move upon the Flathead Reservation, subsequent to the Treaty of '52?

A. Yes many of them objected to leaving the Bitter Root, and some, as I remember it, left and went on to the Flathead; others refused to go until they were moved by the Army, by order of the United States Army.

Q. And about when was it they were moved?

A. Well I don't remember the date but it was, as I recollect it, it was somewhere near the—after 1890.

(Testimony of George H. Beckwith.)

Q. It was subsequent to the time you came here in 1886? A. Yes.

Q. At the time you went on to the reservation the Jesuit Fathers had a mission there?

A. Yes they had a quite an extensive farm, the Sisters of Providence and the Jesuit Fathers and the Ursuline Nuns, and all of them had private ditches and they irrigated considerably.

Q. And did any of those organizations or orders have a mill?

A. Yes they had a flour mill; they ground for themselves and also custom grinding for the Indians.

[447]

Q. And did they do custom grinding?

A. Yes.

Mr. Simmons: No cross examination.

Cross Examination

By Mr. Smith:

Q. I understood you to say that most of the irrigating was done by Breeds, is that correct?

A. Well the Breeds owned the farm and some white men that were married in the Tribe, and I don't remember seeing many Indians—full blood Indians—irrigating.

Q. Would you say that most of the irrigation, the early irrigation development on the Flathead, came about, or was participated in by white men?

A. Well I would say that it was white men and mixed bloods.

Witness Excused.

REVEREND FATHER LOUIS Taelman

was called as a witness on behalf of the defendants, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wallace:

Q. What is your name, Father?

A. Reverend Taelman.

Q. And what is your work—what work are you now engaged in?

A. Missionary work among the Flathead Indians.

Q. On the Former Flathead Indian Reservation?

A. Yes.

Q. What order do you represent or belong to?

A. I belong to the ministry, but the Society of Jesus, it [448] is called.

Q. Also known as the Jesuit Fathers?

A. S. J.—Jesuit Fathers.

Q. You have been on the reservation a long time?

A. I have.

Q. When did you first go there, Father?

A. In 1890.

Q. And in what capacity did you go there then?

A. At that time I was just as a visitor, for a couple of months previous to my appointment as professor at Gonzaga College, and my first impression with the Fathers for two months.

Q. Then you left the reservation for a while?

A. I came back in 1893 and was here for two years—'93 to '95.

Q. And did you go away again?

(Testimony of Reverend Father Louis Taelman.)

A. No I left to make my higher studies, then, of theology, and I was at the Mission again from 1898 to 1899, two years.

Q. During one of these times when you were absent from Saint Ignatius were you then president of Gonzaga College, Spokane? A. Yes.

Q. Were you president of that college there during the time that Judge Webster was at the head of the law department?

A. He was the prime mover of the law department which I initiated.

Q. Then you returned to the reservation to remain permanently?

A. I was here on the reservation previous—I went to Spokane, from 1905 to 1909, and I became president of Gonzaga [449] in 1909; I held until 1913.

Q. Well since that time you have been continuously on the reservation?

A. I have been there continuously the last 16 years, having been 15 years on the Crow Reservation.

Q. And during the time you have been on the Flathead Reservation you have been working as a missionary among the Indians? A. Yes.

Q. Just doing what, Father, as a missionary—what are your duties?

A. Why Divine service on Sundays, holidays and other days, visiting the sick, traveling around and getting acquainted more and more with the families

(Testimony of Reverend Father Louis Taelman.)
throughout the reservation; I used to travel around with my team in the early days, both through the Valley and up on the River and around Elmo, or throughout the whole reservation.

Q. And you visited quite extensively, did you, among the Indians, in the early days?

A. I did, quite a bit, and I was superior, practically, from 1905 to 1909.

Q. Tell the Court, when you first went up on the reservation during the first year, where did you find the Indians located?

A. They were located as Mr. Beckwith says, along the mountains and along the streams—they looked for water and wood.

Q. They wanted to get close to the wood and water? A. Yes.

Q. And in those early years did you find any of the Indians using water to irrigate?

A. Some did; they all had their—practically all, had [450] their own private little settlements and with their homes and their little enclosed lands for their ponies and stock, and irrigated some of the land, and all of them.

Q. Were they getting away from running around, and were they settling down?

A. Yes they were settling down from their nomadic life; the intention of course, of the government and of the agent, was to encourage them to settle down with their private homes and develop

(Testimony of Reverend Father Louis Taelman.)
their little lands that they had selected, and make a living on their lands.

Q. Did these Indians select homesites and sites for their private homes prior to the time the government gave them specific allotments?

A. Well they practically all had their own little selected lands, previous to the official allotment of the government.

Q. What did they do with these selected sites?

A. When I was there, when Major Rankin made the allotments, in fact I believe the sixth of July, 1906, between him and myself we made out all the allotments for the members, and I was there during that period of time when the allotments were made, and of course his plan, as I knew at the time, was to let the Indians stay on the settlement that he had selected, the only difficulty being at times to allot upon the lands according to the survey that had to be made, but as much as possible they all retained their original allotment, particularly the fathers of the families, but I presume it would not stand otherwise.

Q. Who at that time was superintendent of the Flathead Agency?

A. In 1900 it was—I came first as long ago as Major Ronan—— [451]

Q. Did you mention Major Rankin?

A. He was the agent appointed by the government to make the allotments; I had quite a few talks with him, and I remember in looking over the his-

(Testimony of Reverend Father Louis Taelman.)
tory of the Mission, it was on the 6th of July, 1906,
that we settled the lands for our own property.

Q. The Jesuit Fathers, the Ursuline Nuns and
the Sisters of Providence were all allotted those
lands near Saint Ignatius? A. Yes.

Q. Where the Mission stood? A. Yes.

Q. When you first went there did the Jesuit
Fathers have a mill to grind grain? A. Yes.

Q. Do you know when it was that the Jesuit
Fathers first located there?

A. In 1854 on the 24th of September.

Q. And when you came there they had this mill?

A. Oh yes.

Q. And for what purpose?

A. We used the mill for to convert wheat into
flour for the use of the institution; at times for the
benefit of the Indians; besides that we had also a
sawmill and planing mill to help along in construc-
tion to make houses for the Indians.

Q. And did the Jesuit Fathers actually saw lum-
ber for the Indians? A. We did.

Q. With which to construct their homes?

A. Some of the homes—they came to get lumber.

Q. And ground their grain for them?

A. Yes. [452]

Q. This grain was raised from each individual
Indian?

A. Small quantities—that was sufficient, for
many purposes.

(Testimony of Reverend Father Louis Taelman.)

Q. Tell the Court, Father, what encouragement, if any, was given to the Indians to use the waters upon the reservation for irrigation purposes?

A. Well, the several Indians, to some extent, were acquainted with the Treaty of 1855, because it was essential to them, and they knew that by virtue of that Treaty and by the terms present in the Treaty, they were encouraged to make selections for individual homes and settle down and develop their homes and become self-supporting, to some extent; then from my knowledge, in the years I have been on the reservation I have accordingly always encouraged the Indians to settle down and fence in their little allotment, private allotments that they had selected, and develop them to the best of their ability; Major Ronan did a great deal of that around Arlee, around the old Jocko Agency, where the Indians were encouraged to build ditches and dams and bring the water to their respective settlements in that country.

Q. As a matter of fact the history shows that in about the eighties—'eighty-six, the government helped the Indians build a ditch in the Jocko Valley, didn't they?

A. I wasn't here at the time.

Q. Was there a ditch there when you came here, in the Jocko Valley?

A. At the date I came here there was, in 1890, and they used it—, as far as I remember.

Q. What about yourself and the other mission-

(Testimony of Reverend Father Louis Taelman.)
aries—did you encourage the Indians to use this water for irrigation?

A. We were always combining the two things, spiritual work [453] for their souls and the natural physical development for their families, and we knew that for them that was very important.

Q. As a matter of fact the Jesuit Fathers worked in quite close cooperation with the various Indian agents, did you not? A. We did.

Q. And in encouraging the Indians to settle down and to use water for irrigation purposes?

A. We did.

Q. How did these Indians in those days consider their home sites and their own property, Father—what were they led to believe by the Missionaries and by the Indian agents?

A. They knew that, of course—they didn't know very distinctly about the ownership of the lands or the use—but in their own Indian ways they said, "This is our land—this is our reservation, as against anything from the outside," and we deemed it their reservation and their own private allotments, of settlement, and it was respected by the chiefs, who had their own settlements individually, and by the whole tribe, and it was sided in with in the encouragement of the government and of the agents, that the Indians were peacefully settled and peacefully in possession of their own private allotments and in the peaceful possession of their lands so that nothing would disturb them.

Mr. Simmons: No cross examination.

(Testimony of Reverend Father Louis Taelman.)

Cross Examination

By Mr. Smith:

Q. What would you say, Father, as to whether the white persons and the persons of mixed blood were among the more progressive irrigators in the early development of the reserva- [454] tion?

A. You're right.

Q. That is, is it true that those Indians who had white blood or those Indians who had white connections such as a white husband or something of that sort, were the ones who, for the most part, took advantage of the natural resources which were there?

A. I believe that is right. Of course quite a few full bloods had their own water rights and their own series of ditches but the majority of the irrigation work I believe was carried on by the breeds.

Witness Excused.

Mr. Wallace: At this time, may it please the Court, I would like to ask counsel for the government and for the interveners to stipulate with me that the deeds by which the various defendants in this action acquired their respective lands were and are the ordinary form of warranty deed, and that those deeds provide that the defendants acquired the lands with whatever hereditaments and tenements may have been appertaining to the land at the time of their respective purchases.

Mr. Smith: The interveners will stipulate and agree that the lands were conveyed by the ordinary warranty deeds containing the provisions for the appurtenances, without, however, agreeing, as a matter of law, or anything of that sort, that the deeds from the Indians to the whites carried any rights which they may have had. We agree, then, as to what was done, but we do not of course wish to bind ourselves as to the status of these particular deeds—had any [455] particular legal status.

Mr. Simmons: The plaintiff does not consider it necessary to enter into such a stipulation; in view of the law we are invading the province of the Court.

The Court: In this connection, if I recall, it might be well for the defendants to produce their deeds.

Mr. Wallace: Well I didn't discover, your Honor, that there was a denial of the fact that they were warranty deeds, in time to file the reply—that the lands were conveyed to the respective defendants and that they now own them—there is a denial in the reply that any appurtenances were transferred with the deed.

Mr. Simmons: Well we have pleaded in our bill, if the Court please, that the defendants are—own and have control of the lands in question; there is simply no dispute of ownership, on our part.

Mr. Wallace: Are you willing to stipulate that the defendants do stand in the shoes of their predecessors—Indian predecessors?

Mr. Simmons: Well I don't think it is necessary; I think it is invading the province of the Court.

The Court: The question is are you willing to do it?

Mr. Simmons: No, we will stipulate just as far as the attorneys for the interveners stipulated.

Mr. Smith: I will stipulate that the defendants are the present owners of the lands and that the deeds by which they received the property contains the words "Together with any and all hereditaments and appurtenances."

Mr. Simmons: We will enter into the same stipulation.

Mr. Wallace: That is agreeable. [456]

And thereupon counsel for the defendants announced the

Defendants Rest.

And thereupon the following evidence was introduced by the plaintiff in rebuttal:

GUY L. SPERRY

was called in rebuttal on behalf of the plaintiff and having been heretofore duly sworn testified as follows:

Direct Examination

By Mr. Simmons:

Q. Mr. Sperry, during the summer of 1910 did you as an employee of the United States, survey the

(Testimony of Guy L. Sperry.)

W $\frac{1}{2}$ SW $\frac{1}{4}$ Section 17, Township 19 North, Range 19 West, known as the James Waymack allotment 689, and referred to in Plaintiff's Exhibits numbers 8 and 10?

A. I surveyed the lands under this ditch, any lands that were irrigable, under the ditch at that time.

Q. I will ask you this, Mr. Sperry—how many acres, if any, did you find were being irrigated?

A. I found there was no land being irrigated at that time in this particular tract.

Q. Did you find any evidences there of previous irrigation?

A. Not on this particular tract of land.

Cross Examination

By Mr. Wallace:

Q. Was this survey that you made the same survey that is referred to in the exhibits that have been introduced by the government?

A. No sir this was an earlier survey. [457]

Q. Oh——

A. ——This was a survey that was made in 1910.

Q. You say there were no lands being irrigated in 1910? A. On the Waymack allotment?

Q. On the Waymack allotment?

A. That's right.

Q. And what did you say about evidence of previous irrigation?

(Testimony of Guy L. Sperry.)

A. No evidence of previous irrigation.

Q. Of course there may have been some of this Waymack land irrigated in previous years, that had been ploughed up on it?

A. Well there is a possibility for some—it was during the summer—no evidence in that particular year, I couldn't say that there hadn't previously been but there was no evidence of it.

Redirect Examination

By Mr. Simmons:

Q. Did you go on this land at any later time with the committee appointed by the Secretary, to investigate these private water rights?

A. No sir I wasn't with this committee that adjudicated the water rights.

Witness Excused.

Mr. Simmons: That's all we have in the way of rebuttal.

Plaintiff Rests.

Mr. Smith: I will call Mr. Mountjoy.

And thereupon the following evidence was introduced by [458] the interveners in rebuttal:

WILEY G. MOUNTJOY

was called by the interveners in rebuttal, and having been heretofore duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. You are same Mr. Mountjoy who has previously testified in this case, are you not?

A. I am.

Q. Are you acquainted with the lands known as the Wald lands? A. I am.

Q. And are you acquainted with Mr. Wald's methods of irrigation?

A. Reasonably well, yes.

Q. Have you seen the Wald land at times when Mr. Wald was irrigating thereon? A. Yes.

Q. What have you to say as to whether Mr. Wald wastes any water in the irrigation of his land?

Mr. Wallace: Objected to on the ground that it is not rebuttal and is repetition, all gone into on direct.

Mr. Smith: It is for the purpose of rebutting Mr. Wald.

The Court: Well you suggested that you have proved that there is a waste of water.

Mr. Smith: Well——

The Court: If you have, why there is no need of going further. [459]

Mr. Smith: Well the thing I have in mind, if your Honor please, is that the taking of water by

(Testimony of Wiley G. Mountjoy.)

these defendants at periods when the project management does not know about it, causes a waste, regardless of whether they take more water than they can actually use to irrigate their land; I now propose to prove that they do actually—that Mr. Wald does actually take more water than is necessary to irrigate his land.

The Court: Well you have the testimony of a number of witnesses that the taking of water at unexpected times will cause a waste, because the head is cut, and the land is not irrigated; you also produced testimony to show that if unexpected water is added it runs to waste because there is no way in which it can be used, on approximately 24 hours notice.

Mr. Smith: Yes that is right; now I wish to show not that the ultimate taking of water causes waste but that there is actually a greater use of water by Mr. Wald—that he uses more water than he needs to use, regardless of when he takes it or how often he takes it; that is the purpose I have in examining this witness, and I feel that it is competent, in view of Mr. Wald's testimony that he didn't waste any water.

The Court: Well it is merely his opinion as to whether there is or not there is a waste; he can tell you what occurred and how it was done and whether it is in the usual practice, and then the Court will decide as to whether there was any waste of water.

(Testimony of Wiley G. Mountjoy.)

Q. (read by Reporter) What have you to say as to whether Mr. Wald wastes any water in the irrigation of his land? [460]

The Court: I sustain the objection to the present question.

Q. What have you to say, Mr. Mountjoy, as to whether or not Mr. Wald used a greater quantity of water in the irrigation of his land than was beneficial and economical?

A. Yes I believe he does; his land is of a heavy nature, and as he himself stated, takes some time for the water to penetrate; he runs a very large head of water over that land; consequently he has a very large wastage from the covering of his land.

Q. You told before about water running in Mission Feed Canal; does the water from Mr. Wald's land go anywhere else?

A. When Mr. Wald irrigates the portion of his land below C Canal his waste water does not reach Mission C, it runs into Poison Oak Creek—or Ivy to Poison Oak Creek, and from there to Post Creek below his diversion.

Q. Were you the watermaster in the vicinity of the Wald land at the time the culvert was placed in the east and west road that runs past his land?

A. I was not there at the time the culverts were placed but——

The Court: That is all, then, on that line.

Mr. Smith: That's all, Mr. Mountjoy.

(Testimony of Wiley G. Mountjoy.)

The Court: Any cross?

Mr. Wallace: No, thank you.

Mr. Simmons: No.

Witness Excused.

BERT MYERS NELSON,

one of the defendants, was called [461] in rebuttal on behalf of the interveners, and having been already duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. You are the same Bert Nelson who testified this morning are you not? A. I am.

Q. Are you a road commissioner?

A. I was until last April.

Q. And where were you a road commissioner?

A. On the lower end of Lake County, lower third.

Q. And did your jurisdiction as road commissioner extend over the roads near the Thomas Wald land? A. They crossed Tom Wald's land.

Q. Do you know whether or not a culvert was placed by the county in the east and west road running by the Wald land?

A. The Feed Canal, yes, main ditch where it crosses the road; that wasn't on Tom Wald's land, that is before it gets into Tom Wald's land; that is at the Minesinger land.

(Testimony of Bert Myers Nelson.)

Q. Now below the Wald land was there a culvert placed across the road?

A. There were two.

Q. And what is the purpose of those culverts?

A. Well they just take care of the waste water.

Q. Why do they just take care of the waste water?

A. The culverts that were there originally, they were not large enough.

Q. And do you know where that waste water comes from?

A. Well I don't know where it comes from, whether it comes from McDonald Lake ditch or Reclamation water. [462]

Q. But you know there is considerable waste water there? A. Yes.

The Court: Will you kindly tell me what waste water is?

Q. What is——

The Court: We have waste water all over Montana; it runs down the mountain slopes and causes floods; it is Nature's process of carrying away snows and rains.

Witness Excused.

Mr. Smith: I would like to recall Mr. Mountjoy.

WILEY G. MOUNTJOY,

a witness on intervener's rebuttal, was recalled and testified as follows:

Direct Examination

(continued)

By Mr. Smith:

Q. Are you at the present time acquainted with the culverts which are run across the east and west road going by the Wald lands?

A. I am acquainted with the fact that they are there, yes sir.

Q. And have you seen them?

A. Yes I have seen them.

Q. Have you ever seen water running through those culverts? A. Yes.

Q. And from what direction does that water come?

A. It comes from—well in the spring of the year, naturally, it comes from runoffs, which is the melting of snows or the running off of rain; later in the season the water [463] comes from irrigation and is what we would term waste water, inasmuch as it is not beneficially used on the land, and allowed to seep.

Q. Is it true, Mr. Mountjoy, that any farmer irrigating must necessarily lose a certain percentage of the water which he carries across his land?

A. In certain types of soil it is theoretical; on our looser soils there should be no waste, theoretic-

(Testimony of Wiley G. Mountjoy.)

cally; I believe there will be some waste in any ditch.

Q. Now then having in mind the character of the Wald soil, the amounts of water which you have seen flowing through these culverts, and the amounts of water necessary to properly irrigate the Wald land, could you tell us, in your opinion, whether or not the amounts of water flowing through those culverts represent an unreasonable percentage of waste water? A. Extremely.

The Court: Mr. Mountjoy do you mean by that, water running through these culverts came from the Wald land?

The Witness: Yes it must have come from the Wald land.

The Court: And spring run-off because of heavy rains?

The Witness: In the spring of the year, yes, but not during the irrigation season, or at least not to any extent during the irrigation season.

Q. How close is this culvert to the Wald land?

A. Well one of them lays between his two eighties and the other is across the road directly below his eighty.

Q. And approximately how far in feet from his land would that be?

A. Well I suppose either—— [464]

The Court: You can't deal in suppositions; if you know, approximate the distance; if you can't do that, say it is impossible.

(Testimony of Wiley G. Mountjoy.)

The Witness: Either one would be 15—18 feet from his land, I would judge.

Q. And are there any springs or subsurface waters that rise and flow into these culverts?

A. Not to my knowledge.

Q. Do you know the general configuration of the Wald land as it leads out from these culverts?

A. Yes.

Q. And when water comes into these culverts do you know where it comes from—from what part of the surface of the land around the culverts

A. Well it all comes from surface water, from the flooding of his land, the irrigation water.

Q. From the flooding of whose land?

A. Mr. Wald's land.

Q. Now then can you tell me how much water you have seen flowing through the culverts, which, to your knowledge, came from the Wald land?

A. Through the individual culverts?

Q. Yes.

Mr. Wallace: We object to that, may it please the Court, unless it be shown that this is waste water, and water that Tom Wald actually wasted.

Q. Well in the summer time, Mr. Mountjoy, is there any spring run-off running from the——

The Court: Well we will assume that there isn't any, though the heaviest run-off, as I understand it, in many [465] cases comes in June.

Q. During the time, Mr. Mountjoy, when the farmers are irrigating their land in the neighbor-

(Testimony of Wiley G. Mountjoy.)

hood of the Wald land, is there any spring runoff?

A. No—you mean from springs or from melting snows?

Q. No I mean from melting snows?

A. There is none that reaches that land except the various creeks that come from the mountains.

Q. Now then are there any springs in the season, of water bubbling up from the earth?

The Court: He says he doesn't know; isn't that correct, Mr. Mountjoy?

The Witness: I said there were none to my knowledge.

The Court: Well then he knows nothing about it.

Q. Well could you see any indications?

A. None.

Q. Have you actually seen water flowing from the Wald—surface of the Wald land, into these culverts? A. Yes.

Q. Now then can you tell me approximately how much water was flowing into these culverts from the surface of the Wald land?

A. I would say six second feet.

Q. And have you seen that often, on a number of occasions? A. Yes.

Q. Now then, having in mind the character of the Wald land, the area to be irrigated, what is your opinion as to whether six acre-feet represents an unusual amount of wastage of the waters used to irrigate the land—six second feet?

A. I would say it is a large wastage. [466]

(Testimony of Wiley G. Mountjoy.)

Cross Examination

By Mr. Wallace:

Q. Do you know, Mr. Mountjoy, what portion of this six second feet of water you saw flowing through those culverts came from the Magee-Minesinger Ditch?

A. Well it all must run through some portion of the Magee-Minesinger Ditch.

Q. Could it be possible that any of it came from your canal, government canal?

A. Possibly a very small portion.

Q. You wouldn't say how much?

A. I would say less than ten percent.

Q. That is a guess on your part?

A. There have been no measurements taken.

Q. And the snow fall on the Tom Wald land up there is the same as other lands? A. Yes.

Q. And the rainfall there? A. Yes.

Q. And all of these lands of the defendants, and Tom Wald's, slope generally to the west?

A. Yes.

Q. And is it the same general run-off on all this land? A. Yes.

Witness Excused.

Mr. Smith: We have nothing further.

Interveners Rest.

The Court: Any further testimony? [467]

Mr. Simmons: Nothing.

And whereupon, at 3:15 o'clock p.m. on May 8, 1940, the testimony was closed.

The Court: Transcript of the testimony will be furnished not later than six weeks from today. The plaintiff is allowed 20 days from this date in which to prepare and serve upon the attorney for the defendants and the attorney for the interveners a brief in support of its contention here; the interveners are allowed 20 days after this date in which to prepare and serve upon the attorneys for the government and the attorney for the defendants a brief in support of its contention—in support of its complaint in intervention; the defendants are allowed 20 days after service of the plaintiff's brief upon him to prepare, serve and file a reply to the plaintiff's brief, and 20 days after the service upon him of the interveners' brief in support of their contention, within which to prepare, serve and file their reply to that brief; the interveners are allowed 20 days after the service of the government's brief upon them in which to reply thereto; each party is allowed 10 days after the service of the reply brief by opposing parties, in which to prepare, serve and file with the clerk a response to such reply brief as has been filed. Upon the filing with the clerk of a transcript of the proceedings taken during the trial of this case, and the briefs referred to, the matter will be considered as submitted to the Court, and taken under advisement. The usual order of adjournment will be made. [468]

Thereafter, on November 25, 1941, the United States filed its Notice of Appeal herein, in the words and figures following, to wit: [557]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT

Notice is hereby given that the United States of America, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 28, 1941.

JOHN B. TANSIL

United States Attorney for
the District of Montana

KENNETH R. L. SIMMONS

District Counsel, Office of the
Solicitor, Department of the
Interior

Attorneys for the Appellant,
The United States of America

[Endorsed]: Filed November 25, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [558]

Thereafter, on November 26th, 1941, the Interveners filed herein their Notice of Appeal which is in the words and figures following, to wit: [559]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Flathead Irrigation District, a Corporation, and Dennis A. Dellwo, the interveners in the above entitled cause, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled cause on the 28th day of August, 1941, which said judgment dismissed the complaint in intervention without prejudice and granted judgment against the interveners and in favor of the defendants for the defendant's costs. This appeal is taken from the said judgment, and the whole thereof. Dated November 25, 1941.

RUSSELL E. SMITH

Attorney for Appellants,
Flathead Irrigation District
and Dennis A. Dellwo

[Endorsed]: Filed November 26, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [560]

Thereafter, on November 26th, 1941, the Interveners filed herein their Bond on Appeal in the words and figures following, to wit: [561]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents that we, the undersigned, Flathead Irrigation District, a corporation, and Dennis A. Dellwo, as principals, and Massachusetts Bonding and Insurance Company, a corporation duly qualified and authorized to execute bonds and undertakings within the State of Montana, Surety, are held and firmly bound unto the United States of America in the full sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the defendants above-named, for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of November, 1941.

The condition of this obligation is such that whereas, in the District Court of the United States for the District of Montana in the above entitled action pending in said court, a judgment was rendered in favor of the defendants above-named and against the interveners above-named dismissing the complaint in intervention without prejudice, which said judgment was made and entered on the 28th day of August, 1941, and

Whereas, the interveners above-named have filed their notice of appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit, and said interveners propose to prosecute said appeal to reverse said judgment, [562]

Now therefore, in consideration of the said appeal, if the Flathead Irrigation District and Dennis A. Dellwo, interveners, shall prosecute said appeal to effect or shall pay all costs if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this obligation shall be void; otherwise it shall remain in full force and effect.

FLATHEAD IRRIGATION DISTRICT

By RUSSELL E. SMITH

Its Attorneys

DENNIS A. DELLWO

By RUSSELL E. SMITH

His Attorneys

MASSACHUSETTS BONDING AND
INSURANCE COMPANY

By D. B. CAWLEY

Its Attorney in Fact

(Seal)

[Endorsed: Filed Nov. 26, 1941. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[563]

Thereafter, on December 16, 1941, the Interveners filed herein their Statement of Points on Appeal in the words and figures following, to wit: [564]

STATEMENT OF POINTS ON APPEAL

Come now the interveners and state that the points upon which they intend to reply upon appeal are as follows:

I.

Interveners will contend on appeal that the District Court erred in dismissing the complaint in intervention without prejudice, and will contend that both as a matter of law and of fact the court had jurisdiction, and that there was no absence or lack of proper parties.

II.

Interveners will contend on appeal that uncontradicted evidence discloses that the defendants and each of them took water during the period from 1935 to 1939, inclusive, in excess of

(a) the rights granted under the secretarial decree,

(b) the pro rata per acre share computed upon the entire amount of water available for all of the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project,

(c) the pro rata per acre share computed upon the entire amount of water available for all of the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project, deducting stored water,

(d) the pro rata per acre share computed upon the entire amount of water available for the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project, if only the lands originally allotted to Indians are considered,

(e) the pro rata per acre share computed upon the entire amount of water available for the irrigated lands of the Mission Valley Division of the Flathead Irrigation Project, if only the lands originally allotted to Indians are considered and deducting stored water,

(f) the rights of the defendants upon any theory which can be advanced as to the amount of water to which the defendants were entitled.

III.

Intervenors will contend that the defendants are not entitled in the computation of the amount of water, to consider [565] stored water which is made available only by the construction of storage reservoirs and canal systems for which they have not paid and are not liable for payment.

IV.

Intervenors will contend on appeal that the defendants are not entitled to greater amounts of water per acre than are the owners of farm units, or to state it differently, that there is no difference between lands originally allotted to Indians and lands sold at the sales of surplus unallotted lands insofar as the rights to water are concerned.

V.

Intervenors will contend on appeal that the measure of the defendants' right is the measure stated in point number II (c), and in the alternative the measure stated in point number II (e), and in the alternative the measure stated in point number II (a), and in the alternative the measure stated in point number II (d), and in the alternative the measure stated in point number II (b).

VI.

Intervenors will contend on appeal that the defendants, no matter what the measure of their rights, are not entitled to take water except as the same is delivered to them by the project management of the Flathead Irrigation Project.

VII.

Intervenors will contend on appeal that the acts of the defendants in taking water without complying with the orders of the project engineer and manager are wrongful.

VIII.

Intervenors will contend on appeal that the water rights on the reservation may be exercised only under the rules and regulations promulgated by the Secretary of the Interior or his authorized agents.

IX.

Intervenors will contend on appeal that if the District Court had no jurisdiction to try the action, the District Court [566] had no jurisdiction to

make any findings of fact except those involving jurisdiction, and that the court erred in making any other or further findings of fact.

X.

Intervenors will contend on appeal that the lands of the defendants do not lie under the systems provided by the Act of Congress of May 28, 1908 (35 Stat. 448), or any of the acts amendatory thereof or supplemental thereto, and that such lands are without any rights to the waters of the reservation.

XI.

Intervenors will contend that to the extent that the Secretary of the Interior granted by the so-called secretarial decree rights to the defendants or their lands in excess of the rights of other lands on the reservation the secretary acted contrary to law.

RUSSELL E. SMITH

First National Bank Building,
Missoula, Montana,

Attorney for Intervenors.

[Endorsed]: Filed December 16, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [567]

Thereafter, on December 16th, 1941, the Intervenors filed herein their Designation of Record on Appeal in the words and figures following, to wit:

[568]

INTERVENERS' DESIGNATION OF
RECORD ON APPEAL

Interveners, in support of their appeal, hereby designate the following portions of the record, proceedings and evidence in the above entitled cause as that to be contained in the record on appeal herein:

1. Complaint as amended by stipulation.
2. Demurrer to complaint.
3. Order overruling demurrer to complaint.
4. Answer to plaintiff's complaint as amended by stipulation dated May 6, 1940.
5. Plaintiff's reply to answer to complaint.
6. Motion to intervene.
7. Objections of defendants to complaint in intervention and motion to intervene.
8. Order allowing intervention.
9. Complaint in intervention as amended by stipulation dated April 3, 1940.
10. Answer of plaintiff to complaint of interveners and reply to answer of interveners to complaint of plaintiff.
11. Motion to dismiss complaint in intervention.
12. Praecipe to dismiss complaint in intervention as to the defendants, J. A. McKeever, John Minesinger and Ada B. Minesinger.
13. Defendants' answer to complaint in intervention.
14. Interveners' reply to defendants' answer to complaint in intervention.

15. Findings of Fact, Conclusions of Law, and order of court. [569]

16. Judgment.

17. Transcript of the evidence and proceedings at the trial of the cause as filed herein, including the exhibits numbered as follows, which are designated in full: 7, 8, 9, 10, 11, 12, 13, 19, 20, 22, 35; and the following exhibits which will be certified to the Circuit Court as originals: 1, 4, 5, 3, 21; and the following exhibits which are to be abbreviated in the record and inserted at the proper place therein as follows: [The narrative statements of exhibits 2, 14, 15, 16, 18, and the statements of exhibits 23-32, 33, 34 as amended by stipulation December 26, 1941 have been inserted at the appropriate place among the exhibits in the record.]

18. Interveners' Notice of Appeal.

19. Appeal bond.

20. This designation of contents of record on appeal.

21. Statement of points on which interveners intend to rely on appeal.

Dated this 11th day of December, 1941.

RUSSELL E. SMITH

First National Bank Building,
Missoula, Montana.

Attorney for Interveners.

[Endorsed]: Filed December 16, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [570]

Thereafter, on January 9th, 1942, A stipulation amending Interveners' Designation of Record on Appeal was filed herein, in the words and figures following, to wit: [571]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto that Interveners' Designation of Record on Appeal, heretofore filed herein, may be amended in the following particulars:

1. The quoted designation of Exhibits 23 to 32, inclusive, and Exhibit 34, shall be amended to read as follows: [the narrative statement of the exhibits, as amended, has been inserted at the appropriate place among the exhibits in the record].

2. The reference to Exhibit No. 33 shall be amended by adding thereto a statement that the same was dated April 10, 1910, and that the lands therein described are Farm Units and lands not in Farm Units opened to settlement on September 1, 1910, under the Acts of Congress approved April 23, 1904 and May 29, 1908.

3. There shall be added to the designation of the record heretofore filed by the interveners the following portions of Exhibit No. 17, to-wit: Sections 1, 2, 5, 6, 7, 8, 9, 14, 15, 16, 18 and 19, and the remainder of said exhibit shall be summarized as follows:

“Exhibit 17 contains the rules promulgated by the Secretary of the Interior for the management of the Flathead Irrigation Project, as amended July 8, 1933.”

4. This stipulation shall be designated as a portion of said record on appeal, and also the order extending time with- [572] in which to file and docket the record on appeal.

Dated this 26th day of December, 1941.

JOHN B. TANSIL

United States Attorney for the
District of Montana.

KENNETH R. L. SIMMONS

District Counsel, United States
Indian Irrigation Service,
Department of the Interior.

LLOYD I. WALLACE

Attorney for Defendants.

RUSSELL E. SMITH

Attorney for Interveners.

[Endorsed]: Filed Jan. 9th, 1942. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[573]

Thereafter, on Feb. 13th, 1942, Plaintiff filed herein its Designation of Record on Appeal in the words and figures following, to wit: [574]

DESIGNATION BY UNITED STATES
OF RECORD ON APPEAL

The United States of America, an appellant in the above-entitled case, designates to be included in the record on appeal all of those parts of the record, proceedings and evidence which have heretofore

been designated by the interveners Flathead Irrigation District and Dennis A. Dellwo, and the United States also particularly designates the following items to be included in the record on appeal:

1. Complaint, as amended by stipulation filed July 18, 1939.
2. Exhibits 6 and 35 in full.
3. Notice of appeal filed by United States November 25, 1941.
4. This designation of record.
5. Statement of points on appeal filed by United States.
6. Orders extending time until February 23, 1942 for United States to file record on appeal in Circuit Court of Appeals.

JOHN B. TANSIL

United States Attorney for the
District of Montana.

[Endorsed]: Filed February 13th, 1942. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [575]

Thereafter, on Feb. 13, 1942, Plaintiff filed herein its Statement of Points on Appeal in the words and figures following, to wit: [576]

STATEMENT OF POINTS ON APPEAL
BY UNITED STATES

The United States of America, for its statement of points to be relied upon on its appeal of the

above-entitled case adopts and will rely upon the points set forth in the Statement of Points heretofore filed in this Court on behalf of the interveners Flathead Irrigation District and Dennis A. Dellwo, omitting, however, points V, X and XI therein stated.

Plaintiff will rely upon point II stated by interveners, amended, however, so that in parts (b), (c), (d), (e) thereof the word "irrigable" shall be substituted for the word "irrigated."

Plaintiff will rely upon point III stated by interveners, amended, however, to read as follows:

Plaintiff will contend that the defendants are not entitled in the computation of the amount of water, to consider stored water which is made available only by the construction of storage reservoirs and canal systems for which they have not paid.

JOHN B. TANSIL

United States Attorney for the
District of Montana

[Endorsed]: Filed February 13th, 1942. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [577]

That on December 26th, 1941, an order was duly entered herein granting Interveners additional time to file record and docket this case in the United States Circuit Court of Appeals, in the words and figures following, to wit:

[Title of District Court and Cause.]

ORDER

For good cause shown, It is hereby ordered that the interveners be, and they are hereby, granted ninety (90) days from the 25th day of November, 1941, within which to file and docket their record on appeal in the above entitled cause.

Dated this 26th day of December, 1941.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed and entered Dec. 26, 1941. C. R. Garlow, Clerk, U. S. District Court, District of Montana. [578]

Thereafter, on December 29th, 1941, an Order granting Plaintiff additional time to file record and docket case in United States Circuit Court of Appeals was duly entered herein, in the words and figures following, to wit: [579]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING ACTION

Upon Application of the United States and for good cause shown, It Is Ordered, and this does order that the time for filing the record on appeal herein and docketing the action with the Circuit Court of Appeals of the Ninth Circuit is extended to and including the 3rd day of February, 1942.

Done and Dated, December 29, 1941.

JAMES H. BALDWIN,

Judge.

[Endorsed]: Filed and entered December 29, 1941.
C. R. Garlow, Clerk, U. S. District Court, District
of Montana. [580]

Thereafter, on January 22nd, 1942, an order granting plaintiff additional time to file record and docket case in the United States Circuit Court of Appeals was duly entered herein, in the words and figures following, to wit: [581]

ORDER EXTENDING TIME FOR UNITED
STATES TO FILE RECORD IN APPEL-
LATE COURT FROM FEBRUARY 3 TO
FEBRUARY 23, 1942.

Upon Application of the United States and for good cause shown, It Is Ordered, and this does order that the time for filing the record on appeal herein and docketing the action with the Circuit Court of Appeals of the Ninth Circuit is extended to and including the 23rd day of February, 1942.

Done and Dated, January 22, 1942.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed and entered Jan. 22, 1942. C.
R. Garlow, Clerk, U. S. District Court, District of
Montana. [582]

Thereafter, on February 17th, 1942, an Order to Transmit certain Original Exhibits was duly filed and entered herein, in the words and figures following, to wit: [583]

[Title of District Court and Cause.]

ORDER OF TRANSMISSION OF ORIGINAL EXHIBITS

Upon application of R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, one of the attorneys for the United States of America, the appellant herein, and it appearing to the Court that plaintiff's Exhibits 1, 3, 4 and 5 and defendants' Exhibit 21 should, by reason of their form and contents, be sent to the appellate court in lieu of copies under Rule 75, Section (i) of the Rules of Federal Procedure;

It Is Hereby Ordered that the said original exhibits of plaintiff, Numbered 1, 3, 4 and 5, and said original exhibit of defendants, Numbered 21, be by the Clerk of this Court duly certified to the United States Circuit Court of Appeals for the Ninth Circuit and transmitted to the Clerk of said Circuit Court of Appeals by mail with the record on appeal in said cause, said exhibits to be returned to the Clerk of the Court after the final disposition of said appeal according to the practice of the Clerk of the said Circuit Court of Appeals.

Dated February 17, 1942.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed Feb. 17, 1942. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[584]

Thereafter, on Feb. 18th, 1942, a Waiver by Defendants of Further Designation of Record on Appeal was filed herein, in the words and figures following, to wit: [585]

[Title of District Court and Cause.]

WAIVER BY DEFENDANTS OF FURTHER
DESIGNATION OF RECORD

The above-named defendants, by and through their attorneys herein, state that the designations of record on appeal heretofore filed and served by the plaintiff and the interveners are satisfactory and that said defendants intend to file in this Court no other or further designation of parts of the record to be included in the record on appeal, and said defendants hereby waive the remainder of the ten days allowed by Federal Rules of Civil Procedure 75(a) for filing a designation of additional portions of the record, proceedings, and evidence to be included.

It is not intended herein to waive the right to correct the record on appeal by the means provided in Rule [586] 75(h), if it should appear that any-

thing material has been omitted from the record on appeal by error or accident or is misstated therein.

Dated Feb. 17th, 1942.

LLOYD I. WALLACE

Attorney for Defendants

[Endorsed]: Filed Feb. 18, 1942. C. R. Garlow,
Clerk, U. S. District Court, District of Montana.

[587]

Thereafter, on Feb. 24, 1942, copy of order granting plaintiff additional time to file record and docket case was filed herein, in the words and figures following, to wit: [588]

United States Circuit Court of Appeals
for the Ninth Circuit

No.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, et al.,

Appellees.

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE.

Upon consideration of the application of Mr. John Tansil, United States Attorney, counsel for appellant, and good cause therefor appearing, It Is

Ordered that the time within which the transcript of record may be filed and cause docketed be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge.

Dated: San Francisco, Calif.

[Endorsed]: Order, etc. Filed Feb. 17, 1942. Paul P. O'Brien, Clerk.

[Endorsed]: Filed Feb. 24, 1942. C. R. Garlow, Clerk. [589]

Thereafter, on Feb. 24, 1942, copy of Order granting Interveners additional time to file record and docket case was filed herein, in the words and figures following, to wit:

United States Circuit Court of Appeals
for the Ninth Circuit

No.

UNITED STATES OF AMERICA,

Appellant,

vs.

B. W. ALEXANDER, et al.,

Appellee.

Upon consideration of the application of Mr. Russell Smith, counsel for the Flathead Irrigation District, Interveners, and good cause therefor appearing, It Is Ordered that the time within which

the transcript of record may be filed and cause docketed, be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT,
United States Circuit Judge.

February 18, 1942.

Dated: San Francisco, California.

[Endorsed]: Filed Feb. 18, 1942. Paul P. O'Brien,
Clerk.

[Endorsed]: Filed Feb. 24, 1942. C. R. Garlow,
Clerk. [590]

CLERK'S CERTIFICATE TO
TRANSCRIPT OF RECORD

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing four (4) volumes consisting of 590 pages, numbered consecutively from 1 to 590 inclusive, constitute a full, true and correct transcript of all portions of the record in Case No. 1529, United States of America vs. B. W. Alexander, et al., designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that, pursuant to the order of said District Court, I transmit herewith original exhibits Nos. 1, 3, 4, 5 and 21 in said cause.

I further certify that the costs of said transcript amount to the sum of Ninety-four Dollars (\$94.00), and have been paid by the Flathead Irrigation District and Dennis A. Dellwo, intervenors and appellants.

Witness my hand and the seal of said court at Helena, Montana, this March 20th, A. D. 1942.

[Seal]

C. R. GARLOW,

Clerk U. S. District Court,

District of Montana. [591]

[Endorsed]: No. 10095. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. B. W. Alexander, Beckwith Mercantile Company, a Montana Corporation, John A. Hazel, Theodore Knutson and Edna I. Knutson, his wife, P. W. Sorensen, Avery A. Stevens, Meil C. Pierce, Bert Lish, Bert Myers Nelson, John Ellis, J. A. McKeever, Axel Erickson, John Minesinger and Ada B. Minesinger, his wife, and Thomas Wald, Appellees, and Flathead Irrigation District, a corporation, and Dennis A. Dellwo, Appellants, vs. B. W. Alexander, et al., Appellees. Transcript of Record. Upon Appeals from the Dis-

trict Court of the United States for the District of Montana.

Filed: March 23, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10095

UNITED STATES OF AMERICA,
Appellant,

vs.

ALEXANDER,
Appellee.

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE.

Upon consideration of the telegraphic application of John Tansil, United States Attorney and counsel for appellant, and good cause therefor appearing, It Is Ordered that the time within which the transcript of record may be filed and cause docketed, be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge.

Dated: San Francisco, California.

[Endorsed]: Filed Feb. 17, 1942. Paul P. O'Brien, Clerk. Refiled March 23, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER EXTENDING TIME TO FILE TRAN-
SCRIPT OF RECORD AND DOCKET
CAUSE.

Upon consideration of the application of Mr. Russell Smith, counsel for the Flathead Irrigation District, Interveners, and good cause therefor appearing, It Is Ordered that the time within which the transcript of record may be filed and cause docketed, be, and hereby is extended to and including April 27, 1942.

FRANCIS A. GARRECHT

United States Circuit Judge.

February 18, 1942

Dated: San Francisco, California.

[Endorsed]: Filed Feb. 18, 1942. Refiled March 23, 1942. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10095

UNITED STATES OF AMERICA,

Plaintiff and Appellant,
and

FLATHEAD IRRIGATION DISTRICT, and
DENNIS A. DELLWO,

Intervenors and Appellants,

vs.

B. W. ALEXANDER, et al.,

Appellees.

AMENDED STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD FOR PRINTING.

Come now the appellants, Flathead Irrigation District and Dennis A. Dellwo, and hereby adopt as their statement of points on which they intend to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellants, Flathead Irrigation District and Dennis A. Dellwo, hereby designate for printing the entire certified transcript of the record, together with the orders of the Circuit Court extending the time of the United States and Flathead Irrigation District and Dennis A. Dellwo to docket cause and

file transcript in the United States Circuit Court of Appeals.

Dated April 4, 1942.

WALTER L. POPE

RUSSELL E. SMITH

First National Bank Building,
Missoula, Montana,

Attorneys for Appellants,
Flathead Irrigation District
and Dennis A. Dellwo.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]

ADOPTION OF STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF REC-
ORD TO BE PRINTED BY UNITED
STATES OF AMERICA, APPELLANT.

The United States of America, appellant herein,
hereby adopts as its statement of points on appeal
the statement of points appearing in the transcript
of record on file herein.

The United States of America, appellant herein,
hereby designates for printing the entire certified
transcript of record on file with the Clerk of the
above-entitled Court.

Signed and dated at Billings, Montana, this 1st day of April, 1942.

JOHN B. TANSIL

United States Attorney, in and
for the District of Montana.

KENNETH R. L. SIMMONS

District Counsel, Department of
the Interior.

[Endorsed]: Filed Apr. 6, 1942. Paul P. O'Brien,
Clerk.

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, FLATHEAD IRRIGATION
DISTRICT, A CORPORATION, AND DENNIS A. DELLWO,
APPELLANTS

v.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY,
A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE
KNUTSON AND EDNA I. KNUTSON, HIS WIFE, P. W.
SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT
MYERS NELSON, JOHN ELLIS, J. A. MCKEEVER, AXEL
ERICKSON, JOHN MINESINGER AND ADA B. MINESINGER,
HIS WIFE, AND THOMAS WALD, APPELLEES

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA*

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

JOHN B. TANSIL,
United States Attorney, District of Montana.

VERNON L. WILKINSON,
Attorney, Department of Justice, Washington, D. C.

KENNETH R. L. SIMMONS,
*District Counsel, United States Indian Field Service,
Of Counsel.*

FILED

JUL 15 1942

WILLIAM E. DORRIS.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10095

UNITED STATES OF AMERICA, FLATHEAD IRRIGATION
DISTRICT, A CORPORATION, AND DENNIS A. DELLWO,
APPELLANTS

v.

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY,
A MONTANA CORPORATION, JOHN A. HAZEL, THEODORE
KNUTSON AND EDNA I. KNUTSON, HIS WIFE, P. W.
SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT
MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL
ERICKSON, JOHN MINESINGER AND ADA B. MINESINGER,
HIS WIFE, AND THOMAS WALD, APPELLEES

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court wrote no opinion; its findings of fact and conclusions of law are to be found at pages 126-191 of the record.

JURISDICTION

These are appeals from a judgment of the district court entered August 28, 1941, dismissing plaintiff's

and interveners' complaints without prejudice (R. 192-193). Notices of appeal were filed November 25 and 26, 1941 (R. 638, 639). The jurisdiction of the district court was invoked by the United States under section 24 (1) of the Judicial Code, 28 U. S. C. sec. 41 (1), and by the interveners under Rule 24 of the Federal Rules of Civil Procedure. The jurisdiction of this Court to review a judgment dismissing the complaints without prejudice rests on section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a). *Wilson v. Republic Iron Co.*, 257 U. S. 92, 96 (1921); *The Three Friends*, 166 U. S. 1, 49 (1897); *Iowa-Nebraska Light & Power Co. v. Daniels*, 63 F. 2d 322, 324 (C. C. A. 8, 1933).

QUESTIONS PRESENTED

1. Whether the water rights of Indian allottees and their successors in interest are in fact superior to those possessed by the owners of other irrigable lands on the Flathead Indian Reservation.

2. Whether the facts disclosed by the present record entitle the Government and/or the interveners to injunctive relief.

TREATY AND STATUTES INVOLVED

Relevant provisions of the Treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation; pertinent sections of the Act of April 23, 1904, c. 1495, 33 Stat. 302, providing for the allotment of the reservation in severalty; section 19 of the Act of April 23, 1904, as added by the Act of June 21, 1906, c. 3504, 34 Stat. 325, 355, continuing water rights in

statu quo; the paragraph of the Act of April 30, 1908, c. 153, 35 Stat. 70, 83, appropriating \$50,000 for the commencement of the irrigation project; pertinent sections of the Act of May 29, 1908, c. 216, 35 Stat. 444, 448, providing for the disposal of unallotted irrigable lands and the payment of construction charges; relevant paragraphs of the Indian Appropriation Act of May 18, 1916, c. 125, 39 Stat. 123, 139; and pertinent provisos of the Appropriation Act of May 10, 1926, c. 277, 44 Stat. 453, 465, are printed in the chronological order in the appendix, *infra*, pp. 20–37.

STATEMENT*

This suit was begun by the United States in 1936 to enjoin the owners of certain Indian allotments on the Flathead Indian Reservation from diverting water through their privately constructed ditches in excess of amounts allocated to them and their predecessors by the Secretary of the Interior in 1921.

It was the Government's theory in the court below, as evidenced by its complaint, that the Treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation, had impliedly reserved the available waters on the reservation for the use of the Indians, *Winters v. United States*, 207 U. S. 564 (1908) (R. 4–6); that Congress in 1904 and 1908 had directed the Secretary of the Interior to cause the reservation to be surveyed and partially allotted in severalty to members of the tribe, with directions to appraise and dis-

*For a fuller statement of the facts, including a detailed description of the Flathead Irrigation Project, see brief filed by the interveners.

pose of the surplus lands and to use such portions of the proceeds therefrom as he might deem necessary for the construction of systems "for the irrigation of the irrigable lands [both white and Indian] embraced within the limits of said reservation" (R. 6);¹ that expensive canal and reservoir systems had in fact been constructed by the Government for the irrigation of said lands (R. 6-7);² that the cost thereof had been apportioned among Indian and surplus landowners on an irrigable acreage basis (R. 6-7, 20-21);³ that the Secretary of the Interior in 1921 had accorded to the defendants (and to a number of other owners of Indian allotments who likewise irrigate their lands through privately constructed ditches) two acre-feet of water for each acre cultivated by them or their predecessors in 1909 (R. 8-17); and that the defendants were diverting water in excess of the amount allowed by the so-called "secretarial decrees" of 1921, to the damage of other lands within the Flathead Irrigation Project (R. 20-21).

Defendants' demurrer to the complaint having been overruled (R. 23-27), they filed an answer in September of 1936 in which they denied the validity of the "secretarial decrees," affirmatively alleging that in 1905 and 1906 certain Indians had constructed the McDonald-Deschamps and Magee-Minesinger Ditches with sufficient carrying capacity to irrigate adjacent

¹ Act of April 23, 1904, 33 Stat. 302; Act of April 30, 1908, 35 Stat. 70, 83; Act of May 29, 1908, 35 Stat. 444, 448, 450.

² Total cost of the Flathead Irrigation Project from 1910 to 1935 was \$7,238,189.19.

³ Act of May 18, 1916, 39 Stat. 123, 139-142.

lands, that the waters of Post Creek had been diverted through these ditches for the irrigation of said lands, that the defendants had succeeded to the rights of these early appropriators, that they were accordingly entitled to a sufficient quantity of water to beneficially irrigate the allotments adjacent to these privately constructed ditches and that their diversions were not in excess of that amount (R. 27-41).

The case remained in this posture during the next two and a half years pending the decisions of this Court and the Supreme Court in *United States v. Powers*, 94 F. 2d 783 (C. C. A. 9, 1938), affirmed 305 U. S. 527 (January 9, 1939), and *United States v. McIntire*, 101 F. 2d 650 (C. C. A. 9, January 31, 1939). This Court's decision in the latter case holding that section 19 of the Act of June 21, 1906, 34 Stat. 354, 355, was a mere saving clause and not a grant cast considerable doubt on the validity of the "secretarial decrees" pleaded by the Government and it completely exploded defendants' contention that the Indians who constructed private ditches and diverted water prior to the allotment of the reservation in severalty thereby acquired valid water rights.

In order that additional issues might be raised and that the pleadings might be made to conform to the *Powers* and *McIntire* cases, the Government requested the Flathead Irrigation District⁴ and Dennis A. Dellwo, the owner of an Indian allotment within the district, to file a petition in intervention. In their

⁴ The Flathead Irrigation District is one of three state corporations which have agreed to repay construction costs assessed against irrigable lands on the Flathead Indian Reservation.

complaint filed in May of 1939 they alleged (1) that Congress had dedicated all waters of the reservation for the use of the Flathead Irrigation Project, that defendants' lands served by privately constructed ditches have not been brought within the project, that the secretarial decrees were void, and that defendants were not entitled to any water whatever; and alternatively (2) that all irrigable lands within the reservation, both allotted and surplus, were entitled to equal rights, that defendants were therefore merely entitled to a pro rata share of the natural flow waters, and that their diversions were in excess thereof (R. 46-80).

The case came on for trial in May of 1940 (R. 199-637). After hearing testimony and examining briefs of the parties (R. 637), the court found that the defendants were diverting water in the amounts complained of by the Government and the interveners, but that in doing so they had not acted "wrongfully or unlawfully" (Fdgs. 66 and 67, R. 167-168); that the defendants had failed to comply with the project engineer's request to install headgates and measuring devices (Fdg. 68, R. 168-169); that the defendants have deprived the Flathead Irrigation Project of water needed for the irrigation of the *unallotted* surplus lands on the reservation (Fdg. 69, R. 169); that the natural flow waters are insufficient to irrigate the allotted lands, but are sufficient, when supplemented by storage waters, "to raise good crops" on the irrigable *allotted* lands (Fdgs. 98 and 100, R. 185-186).

From these facts the court concluded that all waters flowing on the reservation had been impliedly reserved

for the Indians by the treaty of 1855 (Concl. 1 and 12, R. 187, 190-191); that so long as the United States held these lands and waters in trust for the Indians no title thereto could be acquired by anyone except as specified by Congress (Concl. 2 and 3, R. 187-188); that the Act of May 29, 1908, 35 Stat. 448, 449, allocated to each *allotment* such waters "as may be required to irrigate such land," but if the supply were insufficient, then a "just and equal" share (Concl. 4, 5, and 12, R. 188, 191); that successors in interest to Indian allottees enjoyed similar water rights of which they could not be deprived by the Secretary (Concl. 8 and 9, R. 188-189); and that the complaints should be dismissed without prejudice (R. 191). It seems to have been the trial court's theory, in denying the *Government* any relief whatever, that Indian allotments have water rights superior to those accorded the surplus lands; that if the latter were excluded from the project, the available supply (natural and storage) would be sufficient to furnish all Indian allotments with enough water "to raise good crops" (2 plus acre-feet per acre); that the diversions by defendants, though somewhat in excess of that amount, did not therefore injure the owners of other Indian allotments nor the United States. Having concluded that the water rights of surplus lands were subordinate to the rights of allotted lands, the court also dismissed the *intervenors'* complaint, on the theory that the differing rights of Indian and surplus landowners could not be determined without the joinder of all persons

within the Mission Division of the Flathead Irrigation Project.⁵

SPECIFICATIONS OF ERROR

The errors assigned by the Government in its statement of points (R. 642-645, 650-651), and relied upon on this appeal, may be summarized as follows:

1. The district court erred in holding that the water rights of Indian allottees and their successors in interest are superior to those possessed by the owners of other irrigable lands on the Flathead Indian Reservation.

2. The district court erred in holding that the Government and the interveners are not entitled to injunctive relief.

ARGUMENT

The Government on this appeal does not rely upon the "secretarial decrees" and makes no attempt to sustain their validity. It contends, on the contrary, that all irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights, and that all diversions, whether from Government or private ditches, are to be administered by the project engineer. The Government further contends that the diversions made by the defendants are in ex-

⁵ The Flathead Irrigation Project is composed of three divisions—the Jocko Division, the Camas Division, and the Mission Division—each with a separate water supply (Fdgs. 88-94, R. 183-184). The Mission Division of the project is that area shown in green on Government Exhibit 1, original. All lands involved in this litigation are located in the Mission Division of the project (Fdg. 90, R. 183).

cess of their pro rata share—from which it follows that the Government and the interveners are entitled to injunctive relief.

I

All irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights

The treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation, impliedly reserved the available irrigation waters on the reservation for the Flathead Indians, inasmuch as the lands were arid or semiarid in character (Fdg. 25, R. 145; Concl. 1, R. 187). *Winters v. United States*, 207 U. S. 564 (1908); *United States v. McIntire*, 101 F. 2d 650, 653 (C. C. A. 9, 1939). So long as the reservation was held in communal ownership, the legal title to such waters was in the United States and the equitable title in the Tribe. *Gritts v. Fisher*, 224 U. S. 640, 642 (1912); *Montana Power Co. v. Rochester*, 127 F. 2d 189, 191, 192 (C. C. A. 9, 1942). Being thus reserved, no individual rights in the lands and waters of the reservation could be acquired by anyone until Congress otherwise directed. *United States v. McIntire*, 101 F. 2d 650, 653 (C. C. A. 9, 1939).

No provision for the acquisition of individual rights in the waters of this reservation is to be found in any statute enacted prior to 1904. In that year Congress directed the Secretary of the Interior to cause the reservation to be surveyed and allotted to individual Indians, the surplus lands to be appraised and sold, one-half of the proceeds therefrom to be paid directly to the Indians and the balance expended for their

benefit. Act of April 23, 1904, 33 Stat. 302. But before any lands were actually allotted or sold under the 1904 Act, a reconnaissance survey made in 1907 had disclosed the irrigation and power potentialities of the reservation (R. 199-207; Plaintiff's Exhibit 2, original). Congress thereupon passed two amendatory acts providing for the disposal and utilization of the resources of the reservation in a somewhat different manner: (1) The Act of April 30, 1908, 35 Stat. 70, 83,⁶ appropriated \$50,000.00 for preliminary plans and surveys and beginning construction of "irrigating systems to irrigate the allotted lands of the Indians * * * and the unallotted irrigable lands * * *, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation." (2) The Act of May 29, 1908, 35 Stat.

⁶ Cf. Act of March 3, 1909, 35 Stat. 781, 795; Act of April 4, 1910, 36 Stat. 269, 277; Act of March 3, 1911, 36 Stat. 1058, 1066; Act of August 24, 1912, 37 Stat. 518, 526; Act of June 30, 1913, 38 Stat. 77, 90; Act of August 1, 1914, 38 Stat. 582, 593.

⁷ Representative Sherman, in explaining the purpose of this \$50,000 appropriation, said: "The land [of the Flathead Indian Reservation] is largely arid land. Now, it is proposed to provide an irrigation project by which it will make the land productive and to reimburse the Treasury for the cost of providing this irrigation project *from the lands when sold*, it being believed that the irrigation project will not only make the lands much more valuable for the Indian allotments, but it will make land that is practically of no value now to the Indian allottees valuable, and make it possible for them to maintain themselves on it, and *the surplus disposed of to settlers will make those lands enough more valuable so that the Treasury will be reimbursed for the expenditure in providing the irrigation project.*" 42 Cong. Rec., pt. 2, p. 1784 (1908). See also 42 Cong. Rec., pt. 3, p. 2650 (1908), where Senator McCumber, in discussing the Truckee-Carson irrigation project, said: "That [arid] land is worthless, so far as raising anything

444, 448, directed the Secretary to expend so much of the proceeds from the sales of surplus lands as he deemed advisable "for the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits" of the Flathead Indian Reservation. This Act also required entrymen on lands irrigable under these systems "to reclaim at least one half of the total irrigable areas of his entry," and to pay construction charges apportioned against such tract, as well as its appraised value, before receiving a patent or a water right thereto. The Act further provided that "the land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands *without cost to the Indians for construction of such systems,*" it being contemplated that the proportionate cost of irrigating Indian allotments would be paid out of the proceeds from the sale of surplus land, timber, etc.⁸ Persons purchasing such allot-

on it, without irrigation. How are we going to get it irrigated and get the pay for the irrigation unless the Government does it wholly at its own expense? * * * The Indian, of course, has no money. The Indian can not pay for that irrigation. As I understand the scheme, it is for the Indian to surrender a certain portion of his land, and the Government at its own expense, in lieu of that, will then put in the irrigation works, at no expense whatever to him; and *the balance of the land will be sold to white people who will use it and irrigate and really pay for the entire irrigation, and thereby make all the land valuable.*" Cf. Act of March 1, 1907, 34 Stat. 1015, 1024 (Fort Hall Reservation).

⁸ This method of apportioning construction costs was further modified by the Act of May 18, 1916, 39 Stat. 123, 139-142, an Act ordering these proceeds restored to the tribe, and requiring each acre of land irrigable by the irrigation systems on the reservation

ments prior to the expiration of the trust period were exempted from construction costs theretofore incurred. But all irrigable lands, whether allotted or surplus, were to bear their pro rata share of operation and maintenance costs.

It seems reasonably clear from these statutes, when read in the light of the physical facts, that Congress intended all irrigable lands on the reservation, whether allotted or surplus, to have equal water rights, and to bear a pro rata share of the construction costs. The available waters were reserved for the entire project, Congress well knowing that such a disposition of the waters would redound to the advantage of the Indians as well as the whites. This was so because most of the water for the project is obtained from small mountain streams located for the most part in the southeastern portion of the reservation. Unless fully and carefully utilized and distributed by a costly system of reservoirs and canals the supply would be inadequate to irrigate more than a few hundred acres of land close to the streams. But if the waters of these streams were impounded during flood periods and off-seasons and if all irrigable lands were made to pay a pro rata share of the construction costs on an acreage basis rather than an actual cost basis, the water supply could be made to serve thousands of acres of land far removed from these flash streams. Since the Indians were not re-

(including private as well as Government ditches) to bear directly its pro rata share of the construction costs. This amendment was passed because it was believed unfair to use tribal funds to pay for improvements specially benefiting individual allottees. Cf. Act of February 14, 1920, 41 Stat. 408, 409.

quired to select their allotments in a given locality, it was not possible to irrigate their lands scattered over the entire reservation⁹ unless surplus lands were also given a water right and thus encouraged to bear a part of the construction costs. The requirement in the 1908 Act that a purchaser of surplus lands *reclaim* at least one-half of the total irrigable area of his entry and pay a pro rata share of the construction costs, before receiving a patent, and that the Secretary use the proceeds therefrom to construct an irrigation project for Indian as well as white lands is a clear indication by Congress that it wanted all waters to be reserved for the entire project and all irrigable lands treated alike. In short, lands advantageously located close to the streams and irrigable at a small cost were to be made to pay pro rata assessments in order that other lands further removed from the source of supply could also be irrigated. Those persons near the streams were not to be allowed, merely because of the fortuitous location of their lands, to stay out of the project to the detriment of other persons farther away.

Such a construction of these statutes will not deprive the Indians of rights assured them by the 1855 treaty. It will in fact augment their rights, because (as the present record shows) the waters of the reservation are not even sufficient to irrigate the Indian allotments unless implemented by an elaborate stor-

⁹ "Allotments have been made to the Indians in many widely separated parts of the [Flathead] reservation." *Seventh Annual Report of the Reclamation Service* (1908), p. 101 (Intervener's Exhibit 13, original).

age and canal system, all of which would not be economically feasible but for the contributions to the construction and operation costs made by the owners of surplus lands. And it is to be remembered that this legislation, reserving all waters of the reservation for a unified project, was enacted in May of 1908, some months before the issuance of trust patents to Indian allottees, and over a year before the surplus lands were opened to entry.¹⁰

Contrary to the belief of the court below, the Act of May 29, 1908, 35 Stat. 444, 448, did not give to Indian allotments a superior water right. It merely provided that such allotments should "be deemed to have a right to so much water as may be required to irrigate such lands *without cost to the Indians for construction* of such irrigation systems." In other words, the Indian allottees were to get water rights without cost to themselves, rights which surplus landowners were to acquire only upon payment of their pro rata share of the construction charges.¹¹

¹⁰ Most of the Indian allotments have since passed into white ownership. In fact, Indians irrigated only 452 acres, or 1.3 per cent of the 34,441 acres irrigated on the Flathead Reservation in 1927. *Survey of Conditions of the Indians of the United States*, Hearings of Senate Subcommittee on Indian Affairs (1930), pt. 6, p. 2217. Therefore, as a practical matter, if Indian allotments are given a priority over surplus lands, it will merely mean that one group of white users will be benefited at the expense of other white users on a project which could not have been constructed except as a common enterprise.

¹¹ That this is the proper construction of the 1908 Act is further borne out by its legislative history and by subsequent statutes *in pari materia*—discussed at length in the brief filed by the interveners.

Nor did the fact that defendants' predecessors constructed private ditches in 1905 and 1907 with which to irrigate lands then occupied by them but not yet allotted in severalty give them any additional or different water rights. This Court has already held that these private attempts to appropriate water prior to 1908 conferred no rights on the individual Indians or their successors in interest. *United States v. McIntire*, 101 F. 2d 650, 653 (C. C. A. 9, 1939). Congress, it is true, could have respected these attempts, and did in fact direct the Secretary "to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted lands." Act of May 18, 1916, 39 Stat. 123, 142. But this Act did not accord to these private appropriators any greater water rights; it merely provided that the ditches constructed by them might be accepted in payment or part payment of construction charges otherwise assessable against all irrigable lands on the Flathead Indian Reservation.

It therefore follows that all irrigable lands on the Flathead Indian Reservation, whether served by private ditches or by government constructed canals and reservoirs, are part of the Flathead Irrigation Project (see Fdg. 90, R. 183) and have the same water rights and are liable for their pro rata share of the construction, operation, and maintenance costs (except that those lands served by privately built ditches may be relieved of all or a part of the construction charges).

The facts disclosed by the present record entitle the Government and the interveners to injunctive relief

The court below found as a fact that during the years from 1935 to 1938, inclusive, the defendants who own the eight allotments irrigated by the McDonald-Deschamps ditch made an average annual diversion of 2.29 acre-feet and that the defendants who own the four allotments irrigated by the Magee-Minesinger ditch made an average annual diversion of 7.39 acre-feet for each irrigable acre served by those ditches (Fdgs. 63, 66, 67, R. 165-167)—at a time when the supply was insufficient to furnish more than 1.14 acre-feet to the other irrigable lands in the Mission Division of the Flathead Project (Intervenors' Exhibit 19, R. 401). And even if the entire available supply had been used exclusively on Indian allotments, the latter would have received only 1.34 acre-feet in natural flow and 0.82 acre-foot in storage water, a total of 2.16 acre-feet per irrigable acre (Intervenors' Exhibit 19, R. 401). Despite these findings the court refused to grant the Government any injunctive relief, apparently on the erroneous theory that Indian allotments had first claim to all waters on the reservation, and that the supply was sufficient to furnish Indian allotments with enough water "to raise good crops" (2 plus acre-feet per acre), and hence that the Government, as trustee of the Indians, was in no way injured. But, as we have seen, all irrigable lands on the reservation,

whether allotted or surplus, have equal water rights. The Indian allotments do not have a priority over surplus lands, nor do the Indian allotments owned by the defendants and served by privately constructed ditches have any priority over other Indian allotments on the reservation. *United States v. McIntire*, 101 F. 2d 650 (C. C. A. 9, 1939). Since the supply (natural flow and storage combined) is inadequate to furnish Indian and surplus lands with more than 1.14 acre-feet per acre, a diversion by the McDonald-Deschamps defendants of approximately twice that amount and by the Magee-Minesinger defendants of six times that amount¹² is obviously injurious to other water users on the reservation, including the Indian allottees and the United States as their trustee and as the present owner of the Flathead Irrigation Project. The court should, therefore, have ordered the defendants to install headgates and measuring devices, and to refrain from taking water in excess of the amount allotted by the project engineer to other lands of a similar character.¹³

¹² If natural flow water alone is considered (defendants having contributed nothing to the storage system which provides the project with 40% of its water supply), their diversions are, respectively, three and ten times greater.

¹³ In the court below the Government asked for an injunction against taking water in excess of that allowed by the "Secretarial decrees" of 1921, an amount generally less than that suggested above. It is believed that a court of equity under the new federal rules could and should have given the above relief even though not expressly requested by the Government, especially in view of the fact that such relief was requested by the interveners.

The adjudicated cases indicate that such a determination—namely, that defendants are entitled to only an equal share of the waters of the reservation—could have been made without the joinder of any additional parties. For example, in *United States v. Powers*, 305 U. S. 527 (1939), the Supreme Court decided that persons allegedly outside a reclamation project had *some* water rights, even though that determination affected other users within the project who were not parties to the suit. In that case, the determination was detrimental to such users, because it required a wider distribution of the available water. In this case a determination that defendants are only entitled to their pro rata share would be beneficial to all other users on the project. Other persons served by private ditches need not be joined because they would not be bound by an injunction against the defendants.

CONCLUSION

It has been shown that all lands on the Flathead Indian Reservation, whether allotted or surplus and whether supplied by government or private ditches, have equal water rights and that the defendants are diverting water in excess of their pro rata share. It is accordingly submitted that the judgment below should be reversed and that a decree should be entered requiring defendants to comply with the lawful orders of the project engineer and to refrain from taking

more than their pro rata share of the waters of the Flathead Indian Reservation.

Respectfully,

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JULY 1942.

APPENDIX

Relevant provisions of the Treaty of July 16, 1855, 12 Stat. 975, establishing the Flathead Indian Reservation:

Articles of agreement and convention made and concluded at the treaty ground at Hell Gate, in the Bitter Root Valley, this sixteenth day of July, in the year one thousand eight hundred and fifty-five, by and between Isaac I. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the undersigned chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, on behalf of and acting for said confederated tribes, and being duly authorized thereto by them. It being understood and agreed that the said confederated tribes do hereby constitute a nation, under the name of the Flathead nation, with Victor, the head chief of the Flathead tribe, as the head chief of the said nation, and that the several chiefs, headmen, and delegates, whose names are signed to this treaty, do hereby, in behalf of their respective tribes, recognise Victor as said head chief.

ARTICLE I. The said confederated tribes of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the country occupied or claimed by them * * *.

ARTICLE II. There is, however, reserved from the lands above ceded, for the use and occupation of the said confederated tribes, and as a general Indian reservation upon which may be placed other friendly tribes and bands of Indians of the Territory of Washington who may

agree to be consolidated with the tribes parties to this treaty, under the common designation of the Flathead nation, with Victor, head chief of the Flathead tribe, as the head chief of the nation, the tract of land included within the following boundaries, to wit:

Commencing at the source of the main branch of the Jocko River; thence along the divide separating the waters flowing into the Bitter Root River from those flowing into the Jocko to a point on Clarke's Fork between the Camash and Horse prairies; thence northerly to, and along the divide bounding on the west the Flathead River, to a point due west from the point half way in latitude between the northern and southern extremities of the Flathead Lake; thence on a due east course to the divide whence the Crow, the Prune, the So-ni-el-em and the Jocko Rivers take their rise, and thence southerly along said divide to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out for the exclusive use and benefit of said confederated tribes as an Indian reservation. Nor shall any white man, excepting those in the employment of the Indian department, be permitted to reside upon the said reservation without permission of the confederated tribes, and the superintendent and agent. * * *

ARTICLE IV. In consideration of the above cession, the United States agree to pay to the said confederated tribes of Indians, in addition to the goods and provisions distributed to them at the time of signing this treaty the sum of one hundred and twenty thousand dollars * * *

ARTICLE VI. The President may from time to time, at his discretion, cause the whole, or such portion of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes as are willing to avail them-

selves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

* * * * *

ARTICLE XII. This treaty shall be obligatory upon the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Pertinent sections of the Act of April 23, 1904, c. 1495, 33 Stat. 302, providing for the allotment of the Flathead Indian Reservation in severalty:

* * * the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the flat-head, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flat-heads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flat-head Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the

reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect, appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, * * *

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agricultural land of the first class; second, agricultural land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and

such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent

for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this Act remaining undisposed of at the expiration of five years from the taking effect of this Act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this Act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming im-

plements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

Section 19 of the Act of April 23, 1904, as added by the Act of June 21, 1906, c. 3504, 34 Stat. 325, 355, continuing water rights in *statu quo*:

SEC. 19. That nothing in this Act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the Act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs constructed and used by them in the appropriation and use of said water.

Paragraph of the Act of April 30, 1908, c. 153, 35 Stat. 70, 83, appropriating \$50,000 for the commencement of the Flathead Irrigation Project:

For preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted ir-
rigable lands to be disposed of under the Act of April twenty-third, nineteen hundred and four, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and to begin the

construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation.

Pertinent sections of the Act of May 29, 1908, c. 216, 35 Stat. 444, 448, providing for the disposal of unallotted irrigable lands and the payment of construction charges:

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows:

"SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish Wars, as defined and prescribed in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the Act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said Commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for

the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments, to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of computation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this Act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the the price fixed by said Commission, receiving credit for payments previously made: *Provided, however*, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this Act shall in addition to the payment required by section nine of said Act be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

“The entryman of lands to be irrigated by said system shall in addition to compliance with

the homestead laws reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

“A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments therefor are made.

“All applicants for water rights under the systems constructed in pursuance of this Act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this Act as well as of any moneys already paid thereon.

“The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be dis-

posed of under the terms of this Act and at such price and on such conditions as the Secretary of the Interior may determine, but not less than the cost originally fixed.

“The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

“When the payments required by this Act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.

“The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.”

That section fourteen of said Act be, and the same is hereby, amended to read as follows:

“SEC. 14. That the proceeds received from the sale of said lands in conformity with this Act shall be paid into the Treasury of the United States, and after deducting the expenses of the Commission, of classification and sale of lands,

and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of livestock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians, and the remaining half of said money to be paid to said Indians and persons holding tribal rights on said reservation, semiannually as the same shall become available, share and share alike: *Provided*, That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system."

Relevant paragraphs of the Indian Appropriation Act of May 18, 1916, c. 125, 39 Stat. 123, 139:

For continuing construction of the irrigation systems on the Flathead Indian Reservation, in Montana, \$750,000 (reimbursable), which shall be immediately available and remain available until expended: *Provided*, That the payments for the proportionate cost of the construction of said systems required of settlers on the surplus unallotted land by section nine, chapter fourteen hundred ninety-five, Statutes of the United States of America, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reser-

vation in the State of Montana, and the sale and disposal of all surplus lands after allotment," as amended by section fifteen of the Act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-eight), shall be made as herein provided: *Provided further*, That nothing contained in the Act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-four), shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, or to relieve the owners of any or all land allotted to Indians in severalty from payment of the charges herein required to be made against said land on account of construction of the irrigation systems; and in carrying out the provisions of said section the exemption therein authorized from charges incurred against allotments purchased prior to the expiration of the trust period thereon shall be the amount of the charges or installments thereof due under public notice herein provided for up to the time of such purchase.

* * *

That the Secretary of the Interior be, and he is hereby, authorized and directed to announce, at such time as in his opinion seems proper, the charge for construction of irrigation systems on the Blackfeet, Flathead, and Fort Peck Indian Reservations in Montana, which shall be made against each acre of land irrigable by the systems on each of said reservations. Such charges shall be assessed against the land irrigable by the systems on each said reservation in the proportion of the total construction cost which each

acre of such land bears to the whole area of irrigable land thereunder.

On the first day of December after the announcement by the Secretary of the Interior of the construction charge the allottee, entryman, purchaser, or owner of such irrigable land which might have been furnished water for irrigation during the whole of the preceding irrigation season, from ditches actually constructed, shall pay to the superintendent of the reservation where the land is located, for deposit to the credit of the United States as a reimbursement of the appropriations made or to be made for construction of said irrigation systems, five per centum of the construction charge fixed for his land, as an initial installment, and shall pay the balance of the charge in fifteen annual installments, the first five of which shall each be five per centum of the construction charge and the remainder shall each be seven per centum of the construction charge. The first of the annual installments shall become due and payable on December first of the fifth calendar year after the initial installment: *Provided*, That any allottee, entryman, purchaser, or owner may, if he so elects, pay the whole or any part of the construction charges within any shorter period: *Provided further*, That the Secretary of the Interior may, in his discretion, grant such extension of the time for payments herein required from Indian allottees or their heirs as he may determine proper and necessary, so long as such land remains in Indian title.

That the tribal funds heretofore covered into the Treasury of the United States in partial reimbursement of appropriations made for constructing irrigation systems on said reservations shall be placed to the credit of the tribe and be available for such expenditure for the benefit of the tribe as Congress may hereafter direct.

The cost of constructing the irrigation systems to irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.

That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the owners of the irrigable land. Such charges when collected shall be available for expenditure in the maintenance and operation of the systems on the reservation where collected: *Provided*, That delivery of water to any tract of land may be refused on account of non-payment of any charges herein authorized, and the same may, in the discretion of the Secretary of the Interior, be collected by a suit for money owed: *Provided further*, That the rights of the United States heretofore acquired, to water for Indian lands referred to in the foregoing provision, namely, the Blackfeet, Fort Peck, and Flathead Reservation land, shall be continued in full force and effect until the Indian title to such land is extinguished.

That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the provisions of this Act, and he is hereby authorized and

directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land: *Provided*, That if water be available prior to the announcement of the charge herein authorized, the Secretary of the Interior may furnish water to land under the systems on the said reservations, making a reasonable charge therefor, and such charges when collected may be used for construction or maintenance of the systems through which such water shall have been furnished.

Pertinent provisions of the Appropriation Act of May 10, 1926, c. 277, 44 Stat. 453, 464-465:

For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, \$575,000: *Provided*, That of the total amount herein appropriated not to exceed \$15,000 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, \$100,000; Moiese Canal enlargement, \$15,000; South Side Jocko Canal, \$40,000; Hubbard Feed Canal, \$7,500; Camas A Canal, \$2,500; continuing construction of power plant, \$395,000, of which sum \$15,000 shall be immediately available for additional surveys and preparation of plans: *Provided further*, That no part of this appropriation, except the \$15,000 herein made immediately available, shall

be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance costs within the entire project. Provision shall also be contained therein requiring payment of operation and maintenance charges annually in advance of each irrigation season and prohibit the granting of a water right to or the use of water by any individual for more than one hundred and sixty acres of land irrigable under constructed works within the project after the Secretary of the Interior shall have issued public notice in accordance with the Act of May 18, 1916 (Thirty-ninth Statutes at Large, pages 123-130); all lands, except lands owned by individual Indians, at the date of public notice in excess of one hundred and sixty acres not disposed of by bona fide sale within two years after said public notice shall be conveyed in

fee to the United States free of encumbrance to again become a part of the public domain under contract between the United States and the individual owners at the appraised price fixed at the instance of the Secretary of the Interior, such amount to be credited in reduction of the construction charge against the land within the project retained by such owner. All lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, to which shall be added such amount as may be necessary to cover any accruals against the land and other costs arising from conditions and requirements prescribed by said Secretary: *Provided further*, That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts: * * *



**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA, Appellant,

-vs-

B. W. ALEXANDER, BECKWITH MERCANTILE
COMPANY, a Montana Corporation, JOHN A. HAZEL,
THEODORE KNUTSON and EDNA I. KNUTSON, his
wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL
C. PIERCE, BERT LISH, BERT MYERS NELSON,
JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON,
JOHN MINESINGER and ADA B. MINESINGER,
his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation,
and DENNIS A. DELLWO,

Appellants,

-vs-

B. W. ALEXANDER et al,

Appellees.

**Brief of Appellants, Flathead Irrigation
District, and Dennis A. Dellwo.**

FILED

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PAUL P. O'BRIEN,

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STATEMENT OF JURISDICTION

This is an action commenced by the United States as plaintiff seeking to enjoin (Complaint R. 3 and 21-22) the defendants users of water from a system of private ditches on the Flathead Indian Reservation, from diverting excessive amounts of water from Post Creek and to enjoin the defendants from taking any water in the absence of measuring devices as required by an order of the Secretary of the Interior. The interveners, the Flathead Irrigation District and Dennis A. Dellwo, a water user within the district (Complaint in Intervention, Par. I, R. 52 & 53), admitted by Answer of United States, Par. I, R. 52, and in part by Answer of Defendants, Par. I, R. 89, and proved as to remainder, Ex. 16, R. 363), filed a complaint in intervention after an order allowing intervention (R. 51-52), seeking similar injunctive relief against the defendants. Judgment was entered dismissing the complaint and the complaint in intervention without prejudice. (R. 192). This appeal is from that judgment.

The statutory provision sustaining the jurisdiction of the District Court is Section 24, Judicial Code as amended, 28 U. S. C. A. Sec. 41, which provides that the District Court shall have jurisdiction of all suits of a civil nature in equity brought by the United States. The jurisdiction of the District Court to entertain the complaint in intervention is found in Rule 24, Federal Rules of Civil Procedure.

The statutory provision sustaining the jurisdiction of this court is Section 128, Judicial Code as amended, 28 U. S. C. A. Sec. 225, first paragraph, which provides that the Circuit Court of Appeals shall have jurisdiction to review by appeal final decisions of the district courts.

STATEMENT OF THE CASE

The Pleadings.

This is an action in injunction brought by the United States as the owner of the Flathead Irrigation Project. The complaint alleged that the defendants own lands on the Flathead Indian Reservation which are irrigated from private ditches and which have so-called private rights granted by the Secretary of the Interior for a portion of their lands. The complaint is drawn on the theory that the defendants were diverting more water through the private ditches than was permitted under the Secretary's order and should be enjoined, and that the defendants failed to provide measuring devices required by the regulations of the Secretary and should be enjoined from taking any water until they have installed such measuring devices. (R. 3).

The complaint in intervention alleges that the Flathead Irrigation District, which has a contract with the United States to purchase a portion of the Flathead Irrigation Project system, and Dennis A. Dellwo, a water user under the project system, are damaged by the acts of the defendants in taking more than their proper share of reservation waters. This complaint attacks the validity of the Secretary's order granting so-called private rights because it grants more than a pro rata share of the water and seeks to enjoin defendants from taking more than their pro rata share and from taking any water except as the same is distributed by the officers of the United States. (R. 52).

The answers of the defendants allege that each of the defendants is entitled to sufficient water to properly irrigate the lands of said defendants, that the Secretarial

rights are erroneous in limiting the water to be taken through the private ditches and that the defendants have prescriptive rights to the use of the waters of Post Creek. (R. 27 & 88).

The Facts.

Relation of Parties.

The United States, as trustee for the use of the Indians of the lands and waters of the Flathead Indian Reservation (created by Treaty of July 18, 1855, 12 Stat. 975, 2 Kappler 542), has constructed the Flathead Irrigation Project for the irrigation of Flathead Reservation lands at a cost of \$8,112,649.29 (Ex. 18, R. 372). All of the lands of the defendants and the interveners are within the boundaries of the reservation. (Finding No. 90, R. 183).

There are two general classes of lands on the reservation: Those which pursuant to Acts of Congress were allotted to Indians in severalty, and those which were sold by the United States as surplus unallotted lands, the proceeds of which sales went to the Indian tribe. The latter lands are referred to as either surplus unallotted lands or farm units, and the former as lands originally allotted to Indians. (Act of Congress, April 23, 1904, 33 Stat. 302, and Act of Congress of May 29, 1908, 35 Stat. 448 Appendix).

A great majority of the lands on the reservation are irrigated from the Project System, some 54,000 acres in 1935 (R. 223), and the intervener Dellwo, a successor of an Indian allottee, (Findings 73-74, R. 173-174) is entirely dependent upon delivery from the project system for his irrigation. (R. 456, 457).

The defendants all take water from Post Creek, a reservation stream, through one of two ditches, i. e., the McDon-

ald-Deschamps ditch, or the Magee-Minesinger ditch. (Finding 66, R. 167, Finding 67, R. 167-168). Post Creek is one of the streams which supply water to the project system. The amount of water which the defendants take from Post Creek has a bearing on the amount of water available for the whole Mission Valley Division of the project, and for the intervenor Dellwo. (F. No. 74 and 75, R. 174, R. 235).

The Flathead Irrigation District was created under the laws of Montana providing for the creation of irrigation districts, has executed a repayment contract with the United States, and will upon final collection of the cost of construction of the system from the farmers who own lands in the district, become the owner of the Flathead Irrigation Project. The District likewise collects from its landowners the money which is paid to the United States for the operation and maintenance of the project. (Findings Nos. 76, 77, 78, R. 175; Ex. 15, R. 362).

The Defendants.

The defendants are all successors in interest of Indian allottees. All of them use water out of one of two private ditches known as the McDonald-Deschamps and the Magee-Minesinger ditches. These ditches were dug between 1905 and 1907. (Finding No. 71, R. 169, and Finding No. 72, R. 172). The following table shows the defendants, their Indian predecessors, the allotment number, the total irrigable acreage and the amount of land with a so-called "secretarial right." and the amount of that right.

Each of the defendants as indicated by the table has been granted a so-called secretarial right. These rights were

McDONALD-DESCHAMPS DITCH

Defendant	Indian Predecessor	Allotment No.	Ditch Dug	Total Irrig. Acreage (Ex. 10 & F. 63)	Secretarial Decree Rights (in acre feet Ex. 8)	Acreage Un- der Sec. De- cree (Ex. 8)
B. W. Alexander	Duncan McDonald	561 (F. 71, R. 169)	May 1, 1905 (F. 71, R. 169)	35 (R. 313)	33.6 (R. 286)	16.8 (R. 286)
John Hazel Beckwith Merc. Co. Theodore and Edna I. Knutson	Florence McDonald	560 (F. 71, R. 170)	May 1, 1905 (F. 71, R. 169)	73 (R. 305)	16.4 (R. 287)	8.2 (R. 287)
	Mary C. McDonald	559 (F. 71, R. 170)	May 1, 1905 (F. 71, R. 169)	70 (R. 315)	6.4 (R. 288)	3.2 (R. 288)
P. W. Sorenson	Frank Fiddler	785 (F. 71, R. 171)	May 1, 1905 (F. 71, R. 169)	48 (R. 312)	36.6 (R. 285)	18.3 (R. 285)
Avery A. Stevens Bert Lish Bert Myers Nelson John Ellis F. 45, R. 153	Meil C. Pierce (F. 42, R. 153)	783 (F. 71, R. 171)	May 1, 1905 (F. 71, R. 169)	68.5 (R. 307)	20.6 (R. 281)	10.3 (R. 281)
Avery A. Stevens	William Deschamps	781 (F. 71, R. 171)	May 1, 1905 (F. 71, R. 169)	68 (R. 310)	22.2 (R. 284)	11.1 (R. 284)
Bert Lish Bert Myers Nelson John Ellis F. 45, R. 153	Ora Deschamps	784 (F. 71, R. 172)	May 1, 1905 (F. 71, R. 169)	69.5 (R. 308)	28.2 (R. 283)	14.1 (R. 283)
J. A. McKeever	Caroline McKeever	791 (Comp. R. 14)		78 (R. 316)	2.8 (R. 289)	1.4 (R. 289)

MAGEE-MINESINGER DITCH

John and Ada B. Minesinger	John Minesinger	690 (F. 72, R. 172)	1907 (R. 172)	78 (R. 319)	150.8 (R. 291)	75.4 (R. 291)
Thomas Wald	James Waymack	689 (F. 72, R. 173)	1907 (R. 172)	78 (R. 323)	104.6 (R. 294)	52.3 (R. 294)
	Emma M. Magee	688 (F. 72, R. 173)	1907 (R. 172)	80 (R. 318)	160 (R. 290)	80.0 (R. 290)
Axel Erickson	Julia Minesinger	691 (F. 50, R. 156)	1907 (R. 172)	80 (R. 321)	154.8 (R. 293)	77.4 (R. 293)

granted by an order of the Secretary of the Interior who, after sending engineers into the field, determined the amount of land irrigated through the private ditches and the amount of water to which he found that land was entitled, and awarded the rights on that basis. (Findings 51 to 62, R. 156, 164). It is to be noted that the Secretary attempted to grant rights which were fixed in amount regardless of the quantities of water available. (Throughout the trial this order was referred to as the "Secretarial Decree," and that term will be used herein.)

As disclosed by the above table, the defendants were granted rights of 737 acre feet for 368.5 acres of land. Notwithstanding that the decree gave rights for but 368.5 acres, it is clear that most of the defendants are using water from their private ditches to irrigate much more land than was granted a secretarial right. The names of the defendants, the amount of land awarded a secretarial right, and the amount of lands irrigated from the private ditches are shown in the following table:

Name	Land With Secretarial Right	Land Now Irrigated from Private Ditch
B. W. Alexander	16.8 (R. 286)	40 (R. 534)
John Hazel (Beckwith Merc. Co.)	8.2 (R. 287)	30 to 40 (R. 538)
Theodore Knudson	3.2 (R. 288)	18 to 22 (R. 543)
P. W. Sorenson	18.3 (R. 285)	25.3 (R. 553)
*Avery Stevens	(11.1 (R. 284)	
Avery Stevens	(10.3 (R. 281)	110 (R. 556)
*Meil C. Pierce		38 to 40 (R. 565, 570)
Bert Myers Nelson	14.1 (R. 282)	12 (R. 572)
**Tom Wald	80 (R. 290)	
Tom Wald	52.3 (R. 294)	160 (R. 582)
	214.3	433.3

*Because the Ora Deschamps allotment was divided between Stevens and Pierce, it is difficult to determine the exact amount of the secretarial right owned by each, and hence the evidence is somewhat confused. Likewise it is difficult to determine here the amount of lands irrigated from the project system.

**Wald apparently irrigates 160 acres although the definite figure is not given in his testimony. In any event, he has not confined his use to the acreage awarded a secretarial right. (R. 594).

From this table it is seen that the defendants as to whom there is any evidence have expanded their use of the water from the 214.3 acres granted a right by the Secretary, to some 433.3 acres, and have used and claimed water for more than double the acreage which was granted a right by the Secretary.

There was no evidence offered as to the amounts used by each separate defendant, as there are no measuring devices on the ditches, but the answer of the defendants shows that they were each receiving one-half to one miner's inch per acre, which is equivalent to three to six acre feet per acre. (Ans. Pars. IV and VII, R. 35 to 40).

Water Diverted and Water Supply.

Exhibit No. 19 (R. 401), which is a table prepared by the United States engineers on the project, shows the amounts of water which are available under various circumstances and the amounts actually delivered in some cases. The table shows amounts in acre feet per acre. An acre foot of water is a quantity sufficient to cover an acre to a depth of one foot. (R. 379).

Horizontal Column No. 1 shows the amounts of water in acre feet which were actually diverted to the lands under the McDonald-Deschamps Ditch from 1935 to 1939. Thus sufficient water was diverted to the defendants owning lands under this ditch in 1935 to cover every irrigable acre to a depth of 3.61 feet. (R. 379-380). If diversion loss is considered this figure would have to be reduced 22% (R. 383), or to 2.81 feet, which was the amount actually delivered. (R. 382-383).

Horizontal Column No. 2 shows the amount of water per

acre diverted to these lands if only the lands awarded rights under the Secretarial decree are counted. (R. 381).

Horizontal Columns Nos. 3 and 4 show the same figures for the Magee-Minesinger lands. (R. 383).

It appears from this table that the average diversion for the lands of the defendants over their entire irrigable acreage from 1935 through 1939 was:

McDonald-Deschamps4.32;

Magee-Minesinger8.12.

Considering the diversion loss of 22 per cent on the McDonald-Deschamps ditch (R. 382-383) and an eight per cent gain on the Magee-Minesinger ditch (R. 386), there was actually received on these lands: McDonald-Deschamps, average 4.32 less 22%, or an average of 3.37 acre feet per irrigable acre, and, Magee-Minesinger 8.12 plus an 8% increment (R. 385-386), or 8.76 acre feet per irrigable acre.

Horizontal Column No. 5 shows the amount of water in acre feet per acre which was actually delivered to Dellwo during the same period. (R. 385). The average was 1.19.

Horizontal Column No. 6 represents the average delivery per irrigable acreage in the entire Mission Valley Division of the project during the same time. It is to be noted that in arriving at this figure only farms irrigated were included. In any given year many farms are abandoned or for some other reason are not cultivated, and the irrigable acreage of those farms was excluded in arriving at the figures given. (R. 387-389). This average was 1.14.

Column No. 7 is a calculated figure showing the amount of water which could have been delivered over the entire project if there had been no stored waters. (R. 389-395).

Column No. 8 represents the amounts which could have

been delivered to lands which were originally Indian allotments if no water had been delivered to the farm units. (R. 395-396).

Column No. 9 shows the amounts which could have been delivered to lands originally allotted to Indians if there were no storage facilities. (396-397).

It is to be noted that these various columns were prepared to show the amounts of water available under various theories as to who may be entitled to water and that the amounts of water actually used by the defendants are greater than the amounts available to them under any theory that the court might adopt.

It is to be further noted that all of the calculations in Exhibit 19 refer exclusively to the Mission Valley Division of the project. This division has a separate source of supply, and has no waters which could be used on other parts of the reservation. (Findings Nos. 87 to 97, R. 183-185, and R. 233, 234 and 219-223). The lands of the Intervener Dellwo and of all of the defendants are located in this division of the project (F. No. 90, R. 183), as is most of the land in the Flathead Irrigation District. (R. 236).

Stored, Pumped and Reclaimed Water.

The Flathead Irrigation Project has a reservoir system which makes available for project lands much water which otherwise would not be available. These reservoirs include the Tabor (R. 214), the Kicking Horse, the Ninepipe, the Crow Creek, the Pablo, the Mission, the McDonald (R. 216) and Flathead Lake, from which lake water is pumped. (R. 219). The storage system saves water which would otherwise be lost in the early spring run-off and makes it avail-

able for use in the summer when the real need arises. (R. 391-393). This storage system has a capacity of 98,000 acre feet. (R. 392).

The lands of the defendants which have secretarial rights are not in the irrigation project and hence pay none of the costs, the construction or maintenance and operation of the storage facilities. (R. 390 & 404). These considerations raise the question of whether the defendants are entitled to share in the stored waters.

A Just and Equal Distribution.

It will be contended that the law requires a just and equal distribution of the waters, and interveners will contend that the words "just and equal distribution" contemplate not only an equality in quantity of water, but an equality in cost as well. The facts which are pertinent in this connection are: There were over 54,000 acres of land, not counting lands with private rights, which were irrigated in 1935. Some of these lands such as those of the defendants are close to the supply, while others like those of Dellwo are far removed. (Ex. 1, certified as original, R. 210 and 235). All parties using water under the project system, regardless of their location on the reservation, pay alike for water (R. 403) and receive as nearly as possible equal amounts. (R. 405-406). Only through a central system which has information as to available amounts and the demand can a just and equal distribution be secured. (R. 404-411).

Defendants' Method of Use.

The decree of the Secretary provides that the Engineer of the Reclamation Project shall be appointed the Water

Commissioner for the Reservation and shall distribute the water, and that it is the duty of persons using water under the decree to have suitable headgates, and that in the absence thereof the water commissioner should distribute no water. (R. 270. Approved 301-303). The record further shows that Henry Gerharz, Project Engineer, was appointed water commissioner by the Secretary. (Ex. 11, R. 329).

Gerharz, in July, 1935, wrote the defendants advising them of the provisions of the decree. (R. 331 & Ex. 35, R. 578). The defendants have taken water completely on their own initiative and have actually, by the removal of dams, prevented the project employees from administering the water. (R. 452).

These unregulated diversions by the defendants cause a waste of the reservation's waters. Thus the witness Dexter, a watermaster on the project, testified that the water for Post Creek comes out of the McDonald Lake reservoir and that the defendants' ditches take their water out of the creek just below the reservoir. (R. 448-449). When the watermaster lets sufficient water out of the lake to satisfy the known demand and then the defendants, without the knowledge of the water-master, take water out of the stream, there is a shortage of water and the amounts available for the farmers below are not sufficient to constitute irrigating heads and the water is wasted. (R. 450-451). Likewise, when the defendants have finished using water and turn the water back into the canal system without advising the watermaster of their intention to do so, then there is more water in the canal than can be immediately used and it runs to waste. (R. 449-451). In addition to the waste of water, these unregulated diversions cause a great

deal of administrative difficulty. (R. 449-451). The witness Mountjoy gave similar evidence. (R. 435-439). There was no dispute as to these facts.

The testimony of these witnesses in addition to indicating that the defendants' method of use causes a waste, specifically illustrates the necessity for a central irrigation system under a unified control.

Questions Presented.

Out of this state of facts three principal questions arise:

1. Under the decision in U. S. v. Powers, (CCA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330, does the court have jurisdiction to grant an injunction?
2. Do the defendants have any right to take their water regardless of amount, except as delivered by the Project Engineer?
3. What is the measure of defendants' rights to take water through the private ditches?

SPECIFICATION OF ERRORS

I.

The Court erred in dismissing the complaint in intervention (R. 193) for the reason that the court had jurisdiction of the subject-matter of the action and of the parties, and that the undisputed evidence showed that the defendants and each of them were diverting water in manner and quantity contrary to law.

II.

The Court erred in Conclusion of Law No. 4 (R. 188), wherein the Court concluded that the Act of May 29, 1908, Section 9, (35 Stat. 448-449) allocated to each parcel of irrigable land allotted to an Indian in severalty a right to

use water as may be required to irrigate such land, for the reason that the act quoted did not attempt to define the amount of water allotted to each Indian or his land, but was concerned solely with construction charges, and further the Act specifically allotted water only to lands “under the systems herein provided” (R. 138) and did not by its terms grant rights to lands not under the system.

III.

The Court erred in Conclusion of Law No. 8 (R. 188), wherein the Court impliedly concludes that the lands allotted to the Indians in severalty have a right to the use of all of the reservation waters prior to the right of the surplus unallotted lands to the use of any, for the reason that the Acts of Congress do not distinguish between the right of allotted and surplus unallotted lands to the use of water.

IV.

The Court erred in Conclusion of Law No. 9 (R. 189), for the reason that the court interprets the words “just and equal distribution” as they are used in Section 7 of the Act of 1887 (25 U.S.C.A. 381) to refer exclusively to amounts of water, whereas in fact the words “just and equal distribution” refers not only to amount but likewise to the physical fact of the transportation of water and the cost thereof, and that under said section the secretary did have a right to make rules to secure a just distribution and to require that all persons comply therewith and to deprive any person who failed to comply with such rules and regulations of water.

V.

The Court erred in Conclusion of Law No. 10, (R. 190) for the reason that the adoption by the Secretary of the In-

terior of plans for an irrigation system did, when construed with the Act of May 29, 1908, Section 9, (35 Stat. 448-449) indicate a purpose to exclude all land from participation in water except that under the systems of irrigation provided by the Acts of Congress.

VI.

The Court erred in Conclusion of Law No. 11, (R. 190) for the reason that the court has misstated the contention of the intervener, which is that the United States as Trustee after the treaty owned the lands and waters of the reservation; for the further reason that no person, Indian or white, did as a matter of law have a right to water without the consent of the United States; and for the further reason that Conclusion of Law No. 11 is contrary to Conclusion of Law No. 3, and for the further reason that the defendants, even though entitled to some water through private ditches, had no right to take it except as specified by the Acts of Congress and the rules of the Secretary of the Interior adopted pursuant thereto.

VII.

The Court erred in Conclusion of Law No. 12, (R. 190) for the reason that the treaty did not, and could not have reserved the waters of the reservation to the individual Indians because they did not even live on the said reservation at the time of the treaty, and the irrigable lands had not been ascertained, and for the further reason that Conclusion No. 12 conflicts with Conclusion No. 3.

VIII.

The Court erred in Findings of Fact Nos. 66 and 67, (R. 167) wherein it found that the defendants, by using the amounts of water therein specified, did not act wrongfully

or unlawfully; for the reason that the amounts of water used by the said defendants are greatly in excess of the amounts of water used or available under any theory of a just and equal distribution of water and specifically are in excess of the amounts received by other users during the same period in the Mission Valley Division, and for the further reason that all of said water was admittedly taken contrary to the regulations of the Secretary and in violation of said regulations.

IX.

The Court erred in Finding of Fact No. 70, (R. 169) for the reason that the use of water by the defendants did deprive other users of water needed by them, and for the reason that the finding is contrary to the evidence.

X.

The Court erred in Findings of Fact Nos. 71 (R. 169) and 72, (R. 172) wherein the Court found that the defendants were properly using water to irrigate their lands for the reasons set forth in Specification of Error No. VIII.

XI.

The Court erred in Finding of Fact No. 63, (R. 165) wherein it found (upon Ex. 10, R. 304) that the irrigable acreage of Allotment No. 783 is 78.3 acres, whereas in fact it is 68.5 acres (R. 307); that the irrigable acreage of Allotment No. 784 is 74.5 acres, whereas in fact it is 69.5 acres (R. 308); that the irrigable acreage of Allotment No. 689 is 79.6 acres, whereas in fact it is 78 acres. (R. 323).

XII.

In the alternative if the Court was correct in dismissing the complaint and the complaint in intervention for want of jurisdiction, the court erred in making any findings of fact

and conclusions of law other than Conclusion of Law No. 13, for the reason that if the court had no jurisdiction of the case it had no jurisdiction to make findings or conclusions other than those necessary to disclose want of jurisdiction.

XIII.

The Court erred in failing to find that the defendants and each of them diverted during each of the years 1935 to 1939, inclusive, more than their pro rata per acre share of the waters of Post Creek.

XIV.

The Court erred in failing to find that the defendants or any of them were not entitled to any of the stored, pumped or reclaimed waters of the reservation for lands with a secretarial right.

XV.

The Court erred in failing to find that the defendants had no right to take any water except as delivered to them by the Water Commissioner of the Flathead Irrigation Project.

XVI.

The Court erred in failing to find that to the extent that the Secretarial decree purports to grant rights fixed in time and amount, it is contrary to law and an abuse of the discretion of the Secretary of the Interior.

XVII.

The Court erred in failing to enjoin the defendants from diverting more than their pro rata per acre share of the waters of the reservation.

XVIII.

The Court erred in failing to find that the unregulated diversions of water by the defendants causes administra-

tive difficulties and a waste of water and damages the interveners.

XIX.

The Court erred in failing to find that the use of greater quantities of water by the defendants than they are entitled to causes damage to the interveners, and that such damage cannot be readily ascertained, and that the legal remedy of the interveners is inadequate because of the speculative nature of the damages and the necessity for a multiplicity of suits.

ARGUMENT

(For summary of argument see index)

As indicated, there are three problems involved in this appeal. The question of jurisdiction should logically be first discussed, but because of the fact that it hinges upon the question of the nature of the rights involved we shall consider the question of jurisdiction after we have discussed the remaining problems.

I. *The defendants have no right to take their water except as it is delivered by the project management.*

It is conceded that the defendants in this case have some rights to water (the exact nature of which will be later discussed), but it is contended that such water as they are entitled to must be delivered by the project engineer, and that the defendants have no right to take their water on their own initiative, and thereby create administrative difficulties and cause an actual waste of water.

In *U. S. v. McIntire*, (CAA 9, 1939), 101 F. (2d) 650, this court, in dismissing an action for injunction brought by certain users under a private ditch to prevent the project of-

ficials and others from preventing the plaintiff users from taking water out of Mud Creek, a stream on the Flathead Reservation, said:

“If appellees had been arbitrarily deprived of their ‘just and equal distribution’ perhaps the administrative officers of the project would be compelled to make proper distribution. Here, however, appellees claim a right wholly separate and distinct from whatever allocation the Secretary of the Interior might make.”

We believe that this decision clearly demonstrates the proposition that all rights to water on the Flathead Indian Reservation must stem from the United States and that no person is entitled to water except as delivered by the “administrative officers of the project.”

If we start with the proposition that upon the execution of the treaty the United States became trustee of the lands and waters for the benefit of the Indians, and that one who seeks to establish title must trace it from the United States, as announced in the *McIntire* case and *Montana Power v. Eugenia Rochester*, (CCA 9), 127 F. 2d. 189, the legislation and administrative action of the Secretary of the Interior taken pursuant to it, compel the conclusion that defendants in taking water themselves acted unlawfully.

All of the legislation affecting the Flathead Reservation lands up to 1916 indicates the intention of Congress that water should be delivered to lands through the irrigation systems provided for by the respective acts, and in no other manner. (Section 19 of the Act of June 21, 1906, (34 Stat. 354) is a mere saving clause. *U. S. v. McIntire*, supra, 101 U. S. 650, 654.) Thus, the Act of Congress of May 29, 1908 (35 Stat. 448) provided that the entryman (a purchaser of surplus unallotted lands) should pay for a water right the

proportionate cost of the construction of the system; should before receiving a patent pay the charges apportioned against such tract; that no rights to water should permanently attach until all payments therefor are made; that all applicants for water under the systems constructed should pay annual charges for operation and maintenance; and then the act provides:

“The land irrigable under the system herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.”

The act continues.

“When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for such construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.”

It is to be noted that this act refers only to lands “irrigable under the systems herein provided.” After several years, during which Congress took no action except to appropriate for the construction of irrigation systems, the Act of May 18, 1916 (39 Stat. 139) was enacted. It provided: for the assessment of construction charges against

the purchasers of lands allotted to Indians, that the Secretary of the Interior might announce charges for construction against each acre of land irrigable under the systems; for the assessment of construction charges generally, and then provided:

“That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the provisions of this Act, and he is hereby authorized and directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land.”

The defendants in this case simply cannot point to any legislative enactment except as above quoted which in any manner grants to them as the owners of private ditches a right to take water. Under this language it was clearly the Congressional intent that the user by private ditch acquired no right except at the discretion of the Secretary.

The question then arises, what action, if any, did the Secretary take? The answer is found in the Secretarial decree which, after determining the acreage watered from private ditches, provided how the water should be taken, as follows (R. 300):

“The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall

have authority to regulate the distribution of water among the various users under any particular ditch.

All persons using water under a decree of the Secretary of the Interior are required to have suitable head-gates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch.” (R. 300—See also R. 279-280).

On June 8, 1934, Henry Gerharz, then Project Engineer, was appointed Water Master in a letter from the Secretary of the Interior which, among other things, provided:

“The report of the Commission appointed for the purpose of determining old water rights on the Flathead Indian Reservation in Montana, which was approved by the Department on November 25, 1921, included the following provision:

The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

Pursuant thereto, the then Project Engineer, Mr. C. J. Moody, was specifically appointed under date of August 10, 1922 by the Department to act, as Water Commissioner on this reservation.

As you state, the Commission itself was discontinued on August 7, 1929, but this did not discontinue the office of the Water Commissioner whose duties are to administer the approved findings of the Commission.

In view of the fact that the Water Commissioner must effect the division of the waters of the reservation between private parties and also between them and the Government irrigation project, it is felt that the Project Engineer is in the best position to perform these duties. Your request to be relieved of the responsibilities in this connection is, therefore, denied and you are hereby specifically appointed as Water Commissioner to do the things contemplated by the Commission's report." (Ex. 11, R. 327).

The defendants have refused to accede to the jurisdiction of the Water Commissioner, and have broken out the dams constructed by him. (R. 452). The defendants likewise failed to put in the headgates and measuring devices required by the decree. (Finding No. 68, R. 168 as to McDonald-Deschamps defendants, and as to the others R. 331-332).

Since, therefore, the only legislation granting rights vests discretion in the Secretary of the Interior, since he has made the allowances provided for in the act, since those rules and regulations not only carry into effect the provisions of the Act but also promote the just and equal distribution of water, and since the defendants have diverted water in complete violation of the rules provided by the Secretary of the Interior, to the damage of the interveners, we submit that an injunction should issue.

II. *The correct measure of the defendants' rights to the use of the waters of the Flathead Reservation—a pro rata share of the waters, exclusive of stored waters.*

It is perhaps unnecessary for the court in this case to de-

termine the precise nature of the defendants' rights for the reason that whatever theory may be adopted by the court, the defendants have taken more water than they are entitled to and have taken it in a wrongful manner and should consequently be enjoined. However, if the court wishes to make the injunction specific the question must be decided.

There are perhaps six different theories under which defendants might claim water for their lands not included within the project. As we see it, those theories are as follows:

1. So much as is required, claimed upon the doctrine of prior appropriation.
2. The amount awarded by the Secretarial decree.
3. Their pro rata share on an irrigable acreage of farms irrigated basis, considering only Indian allotments and without deducting stored water.
4. Their pro rata share on an irrigable acreage of farms irrigated basis, considering only Indian allotments and deducting stored water.
5. Their pro rata share on an irrigable acreage of farms irrigated basis without deducting stored water.
6. Their pro rata share on an irrigable acreage of farms irrigated basis deducting stored water.

We shall discuss each of these theories separately and point out that Theory No. 6 is the basis upon which the defendants' rights should be determined.

Theory No. 1—Prior Appropriation

Since the pronouncement of this court in *U. S. v. McIntire*, (CCA 9, 1939), 101 Fed. (2d) 650, it is clear that the

doctrine of prior appropriation is not operative upon the Flathead Indian Reservation. In that case this court said:

“Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U. S. C. A. Sec. 661, requires recognition of those rights. That statute, however, applies only to ‘public’ lands. *Winters v. United States*, 9 Cir., 143 F. 740, 747, affirmed 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340. Lands which are reserved are severed from the public domain. *Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 733, 745, 23 L. Ed. 634; *United States v. Minnesota*, 270 U. S. 181, 206, 46 S. Ct. 298, 70 L. Ed. 539. The statute mentioned, therefore, does not, we think, apply here. Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, ‘shall remain under the absolute jurisdiction and control of the Congress of the United States.’ 25 Stat. 676, Sec. 4.

“Appellees further rely on Sec. 19 of the Act of June 21, 1906, as indicating that Congress recognized that waters might be appropriated. We think it is clear that the section relied on granted nothing, but was in effect a savings clause. At the time of its enactment, *Winters v. United States*, supra, had not been finally decided, and the question as to whether waters for Indians had been reserved by the treaties was debatable. The purpose of the section was to save any valid rights, if the question was answered in the negative.”

Consequently, the defendants in this case have no rights superior to those of others by reason of the early use of waters by the predecessors of these defendants. We may therefore dismiss Theory No. 1.

Theory No. 2—Secretary's Decree of a Fixed Amount.

The Secretary of the Interior purported to award to each of the defendants in this case a right to a definite amount of water for a definite area of land and fix a definite date of priority without regard to the effect that such an award might have on other reservation lands. (Ex. 8, R. 275, Finding No. 53, R. 157). In short, the Secretary attempted to adjudicate Post Creek on the basis of the doctrine of appropriation. While interveners, as pointed out in an earlier part of this brief, assert the full validity of the Secretary's acts in appointing a water commissioner for division and administration of the reservation waters, interveners contend that the Secretary was without this power to award a fixed, definite amount of water to these private ditch owners.

In the *McIntire case*, *supra*, this court decided that no rights by appropriation could be acquired. Consequently even the Federal courts were powerless to award rights on that basis. It necessarily follows that if no rights were acquired by appropriation the Secretary had no power under the guise of an adjudication to give validity to any purported rights in the absence of a law vesting such power in him. In all the legislative history of the Flathead Reservation there is no such power given.

Section 19 of the Act of June 21, 1906, (34 Stat. 354), which is the only act mentioning appropriation, was properly held in the language above quoted from *United States v. McIntire*, to be a mere saving clause and not operative to create rights. Believing that the interpretation of Section 19 of the 1906 Act is controlled by the *McIntire case*, we shall not further urge the matter here.

Certainly the Act of May 29, 1908 (35 Stat. 448) did not give the Secretary of the Interior power to make his adjudication. The whole purport of the 1908 Act is to provide a general system of irrigation for the entire reservation and to require that each piece of land allotted pay its share of the operation and maintenance costs. As a matter of fact the act of the Secretary in awarding these private rights is contrary to the entire theory of the 1908 Act. The secretarial rights were awarded in this case to lands near Post Creek. Obviously the cost of delivering water to these lands would be less than to those more distant from the source of supply. The 1908 Act provides for a pro rata distribution of the cost. The only power given to the Secretary by the Act in question is the power to make rules and regulations to carry the Act into effect, and his action in awarding rights to certain individuals at the expense of others is certainly not authorized by the law, but is actually contrary to the whole purpose of it.

Section 7 of the General Allotment Act of 1887 (24 Stat. 388, 25 U. S. C. A. 381) reads as follows:

“That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; *and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.*” (Italics supplied).

The power given to the Secretary in this Act is limited to the adoption of rules “to secure a just and equal distri-

bution” among the Indians and the italicized portion of the act clearly prohibits any preferential treatment.

In the *Powers Case*, 305 U. S. 527, 59 S. Ct. 344, the Supreme Court very plainly denied to the Secretary power to provide for an unjust and unequal distribution in this language:

“The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.”

In light of the above it is our position that the decree is void to the extent that it purports to award rights.

Reference to Exhibit 19 (R. 401) discloses that two acre feet per acre, the amount awarded by the Secretary, is more water than has been actually delivered to other users on the reservation. Thus from 1935 to 1939 Dellwo received an average of 1.19 acre feet per acre, while the general deliveries on the entire Mission Valley Division were 1.14 acre feet per acre, and in no year did Dellwo or the others receive two acre feet. If only Indian allotments are considered two acre feet is more than could have been delivered in 1937 (the possible deliveries in that year were 1.78 acre feet), and unless defendants are entitled to share in stored water for which they pay nothing, two acre feet is more than could have been delivered in any year. However, in any event a decree which fixes an arbitrary quantity of water provides an unjust and unequal distribution of water.

As pointed out in other portions of this brief, we believe

the Secretarial decree to be valid to the extent that it regulates the manner of use, for such portions of the decree carry out the Congressional intent, and it is only to the extent that the decree departs from the legislation that we deem it void.

Theories No. 3 and 4—Preference for Allotments

Theories 3 and 4 raise the question of whether under the law the lands allotted to the Indians in severalty are entitled to a preferential treatment.

Congress, by the Act of April 23, 1904 (33 Stat. 302), provided for the allotment of lands in the reservation to the Indians in severalty and at the same time provided for the sale of surplus unallotted lands. Under the 1904 Act the money received by the Secretary from the sale of the lands was to be used for the benefit of the Indians.

By the Act of April 30, 1908 (35 Stat. 83), Congress appropriated \$50,000 for the survey of the allotted and unallotted lands and to commence the construction of an irrigation system. It is to be noted that in this Act Congress did not distinguish in any manner between the allotted and surplus unallotted lands.

In the Act of May 29, 1908 (35 Stat. 448), Congress first provided for the opening of the reservation and the payments to be made by the settlers thereon. The Act then provides:

“Provided, however, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act shall, in addition to the payment required by section nine of said act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as

fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

“The entryman of lands to be irrigated by said system shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.”

And then further provides:

“All applicants for water rights under the systems constructed in pursuance of this act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the waterright application and the entry subject to cancellation, with the forfeiture of all rights under this act as well as of any moneys already paid thereon.”

Under this Act the settler was required to do three things in addition to paying for the land.

1. Pay for a water right.
2. Reclaim one-half of the irrigable land.
3. Pay operation and maintenance costs.

Later on the Act provides:

“The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased

prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.”

It is in connection with this language that the difficulty arises. It is our contention that Congress by this language intended merely to provide that the allotted lands should have a water right without cost of construction and that it was not the Congressional intention to distinguish between the water right granted to the surplus unallotted land and that granted the allotted land insofar as the quantum of the right was concerned. At the time of the Act it was then planned to use the funds obtained from the sale of the unallotted lands to pay the cost of construction. (Section 14).

1. *The Act, reasonably interpreted, treats all lands alike.*

It is almost inconceivable that Congress should require the homesteader to—

1. Pay for the cost of an irrigation system his pro rata share on an irrigable acreage basis when there might be no water from it.
2. Reclaim one-half of his land in the hope that the allotments would not take all of the water.
3. Pay operation and maintenance charges based upon an irrigable acreage basis while others who received a greater amount of water should pay on exactly the same basis.

Further than this, by limiting the rights granted to “lands under the systems herein provided,” Congress, if it

intended to determine the *quantity* of right by the language used, gave a preferential right to those Indians who received lands irrigable under the "system" and thereby *excluded those Indians whose lands were not under the systems, including portions of the lands of these defendants.* In this connection see Finding No. 98 (R. 185) to the effect that there is not sufficient water to meet the requirements of the lands originally allotted to Indians. If we are so strictly to apply the word "require," then we must strictly apply the words "irrigable under the systems," and Indians whose lands are not "irrigable under the systems" would likewise be eliminated until the other Indian lands have had their requirements.

The case of *U. S. v. Powers* (CAA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330, indicates that such an interpretation is to be avoided. There the Supreme Court said:

"We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes."

As a matter of law this court is not required to put a rigid interpretation upon the words "require" and "irrigable under the systems herein provided."

In *Insurance Co. v. Gridley*, 100 U. S. 614, 25 L. Ed. 746, the Supreme Court said:

"A thing which is within the letter of the statute is not within the statute unless it be within the intention of its makers."

Again in *Holy Trinity Church v. U. S.*, 143 U. S. 457, 36

L. Ed. 226, 12 S. Ct. 511, the same court said:

“... frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the *absurd results* which follow from giving such a broad meaning to the words, makes it unreasonable to conclude that the legislator intended to include the particular act.” (*Italics supplied*).

In *Barrett v. Van Pelt*, 268 U. S. 85, 69 L. Ed. 857, 45 S. Ct. 437, the court said:

“The intention of the law maker constitutes the law, *Stewart v. Kohn*, 11 Wall. 493, 504. See *Smythe v. Fiske*, 23 Wall 374, 380. Being satisfied of the legislative intention the court will not be prevented from giving that intention effect by too rigid adherence to the very word and letter of the statute. *Oates v. National Bank*, 100 U. S. 239, 244.”

To the same general effect are numerous decisions of the Federal courts, among which are

Fleischman Const. Co. v. U. S., 270 U. S. 349,
70 L. Ed. 624, 46 S. Ct. 284,
Town of Clayton v. Colorado (CCA N. M. 1931)
51 F. (2) 977.
Saginaw Broadcasting Co. v. Federal C. Com.
(App. D. C. 1938), 96 F. (2d) 554,
Marlen v. Cardillo (App. D. C. 1938), 95 F.
(2d) 112.

It is clear that the purpose of the 1908 Act was to provide for the construction of an irrigation system. It is further clear that Congress was primarily interested in how the costs should be borne and was not trying to allocate the waters of the reservation. If Congress had intended to make such an allocation certainly some reference would have been made to the rights of the farm units and the rights of those allotted lands which were not under the sys-

tems. All that Congress intended was to grant the Indian a right to water from the system without payment of construction costs.

Certainly it would be absurd for Congress to require that the purchaser of a farm unit pay for his pro rata share of the construction of a project, the waters of which were to be denied him, and even more absurd to require the purchaser to reclaim one-half of his "irrigable land" if there was to be no irrigation of it because of a disposal of all of the water to other land.

2. The legislative history of the enactment discloses the intent that all lands should be treated alike.

These provisions of the Act of May 29, 1908, (35 Stat. 448) were enacted as a part of H. R. 21,735 of the 60th Congress, 1st. Session. They were inserted by amendment in the Senate when the bill reached that body (42 Congressional Record, Part 7, page 6594). As shown by a statement accompanying the conference report which accepted the amendment (42 Cong. Record, Part 7, p. 7050) the amendment was taken bodily from Senate Bill 3640 as the latter bill was amended by the House committee. That committee's report on S. 3640 (House Report No. 1189, 60th Congress, 1st. Sess.) which is included in its entirety in the appendix to this brief, page 69, supplied the language here in question and explained its purpose at some length. The purpose in mind was the setting up of a proper system for the apportionment of construction and operation costs, as between allotted lands and lands sold to settlers. Attention was called to the fact that by Section 14, as amended in this act, the tribal funds derived from the proceeds of

sales of surplus unallotted lands should be used for the construction of the system. Previous appropriations had been reimbursable to the United States from this fund. (See Act April 30, 1908, 35 Stat. p. 83). The effort of the committee to equalize all charges as between both classes of lands is disclosed by the following language of the report:

“The provisions of the original act were found also to be insufficient to provide for the apportionment of the cost of the construction of the irrigation system to the various tracts of land and also to provide for the apportionment of the cost of operation and maintenance of the system after its completion. By the terms of this act the lands which may be allotted to the Indians will not be charged with any of the cost of the construction of the irrigation system, but their proportionate part of the cost of construction will be taken out of the general fund by the Secretary of the Interior. The lands to be sold to settlers will be charged with their proportionate cost of this irrigation system, and this will be payable in fifteen annual installments. Various other matters of detail respecting the water rights are covered by the bill.

As the bill passed the Senate and came to the House it undertook to release the Indians from the payment of their proportionate share of the cost of operation and maintenance of the irrigation system. On the hearing of the bill before this committee it was developed that in all probability three-fourths of the irrigable lands would be allotted to Indians, and it was seen that in all probability the great burden of maintenance of this extensive irrigation system might be thus thrust upon a very few of the purchasers of land, and, such being the case, no prudent purchaser would feel like investing his money in the purchasable land when the cost of maintenance would be so unevenly adjusted as to throw the entire charge upon him, and in some cases the charge might be sufficient to cover the entire value

of his land. The attention of the author of the bill, together with the Indian Office, was brought to this matter by your committee, and, after careful consideration of all the facts and circumstances, the five amendments proposed by your committee and submitted herewith were agreed upon. As a result of these amendments your committee is of the opinion, and this opinion is shared in by the Reclamation Service and by the Commissioner of Indian Affairs, as well as the author of the bill in the Senate, that the irrigation system can be carefully constructed, the cost thereof equitably adjusted, and the cost of maintenance and operation will be evenly distributed to the various owners of irrigable lands. The Flathead Reservation, where the irrigation system will be constructed, embraces an area of very fine land especially adapted by reason of soil and climatic conditions to the growth of small fruits and grain."

It is obvious that the committee in framing this report, and Congress in enacting the amendment here proposed, had no thought that the water rights were to be unequal; on the contrary, in attempting to equalize the charges Congress must have assumed that the rights were to be equal.

3. *The legislative and executive interpretations indicate that Congress did not intend that there was to be a distinction between farm units and allotted lands.*

In *First National Bank v. Missouri*, 263 U. S. 640, 68 L. Ed. 486, 44 S. C. 213, the Supreme Court said:

"This interpretation of the statute by the legislative department and by the executive officers of the government would go far to remove any doubt as to its meaning if any existed."

All of the Acts of Congress, both before and after the Act of May 29, 1908 (35 Stat. 448), indicate a similarity in the treatment of allotted and surplus unallotted lands. By the Act of April 30, 1908 (35 Stat. 83) Congress appropri-

ated money for the "allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted lands to be disposed of under the Act of April twenty-third, nineteen hundred and four." Similar language is contained in the later appropriation acts.

Act of March 3, 1909 (35 Stat. 795).

Act of April 4, 1910 (36 Stat. 277).

Act of March 3, 1911 (36 Stat. 1066).

Act of August 24, 1912 (37 Stat. 526).

Act of June 30, 1913 (38 Stat. 90).

Act of August 1, 1914 (38 Stat. 593).

By the Act of May 18, 1916 (39 Stat. 139) Congress adopted the recommendation contained in the report of a commission appointed to investigate this irrigation project. (House Document No. 1215, 63d. Cong., 3rd. Session, House Documents Vol. 103, p. 33). The Commission recommended "that future appropriations for irrigation work on the projects on these three Indian Reservations be made by direct appropriation of any funds available in the treasury of the United States, and such funds be made reimbursable, and the repayment of the same to be held as a lien against the lands benefitted, both those held by allottees and entrymen, and not hypothecate the tribal funds."

Accordingly there was returned to the tribal funds all moneys theretofore expended for construction, and the owners of all lands, whether allotted or unallotted, were required to repay the United States their proper proportion of the construction charges in sixteen installments. These construction charges were to be charged to "the allottee, entryman, purchaser, or owner of such irrigable land." The act then went on to provide:

"The cost of constructing the irrigation systems to

irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.

That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the owners of the irrigable land."

Clearly, Congress here considered that the rights of the allottee and of the entryman were the same.

If there were any doubt about the matter it is settled by the Act of May 11, 1926 (44 Stat. 464). That act provided that the landowners on the reservation should organize irrigation districts under the state law, and that the irrigation districts should agree to repay the costs of construction. The act then specifically provides:

"That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts."

It is clear from this act that Congress, while not ceding its jurisdiction over trust patent Indians, did contemplate that all of the reservation lands should be accorded the

“same rights and privileges.” A contention that there is a difference between allotted and unallotted lands simply cannot stand in the face of this unequivocal declaration by Congress.

It is likewise the rule that—

“The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. *United States v. Moore*, 95 U. S. 760, 763; *Hastings and Dakota Railroad Co. v. Whitney*, 132 U. S. 357, 366; *United States v. Alabama Great Southern Railroad Co.*, 142 U. S. 615, 621; *Kindred v. Union Pacific Railroad Co.*, 225 U. S. 582, 596.”

Logan v. Davis, 233 U. S. 613, 58 L. Ed. 1121,
34 S. Ct. 685.

In this case the project officials have recognized no distinction between allotted and surplus unallotted lands, but treat all landowners as nearly alike as possible. (R. 404). This administrative practice is entitled to great weight.

It may be argued that Exhibit 33 (R. 489) indicates a contrary administrative declaration. However, it is clear that at that date construction of the system had barely begun, the location of ditches, reservoirs and canals not ascertained, and future appropriations uncertain. Hence irrigable acreage was wholly undetermined, and so this statement did nothing more than to advise the prospective purchasers that the rate and extent of construction of the system was problematical and that it could not be foreseen just when or in what quantity the water would be delivered. The statement was just as true of the allotted lands. Cer-

tainly there is no declaration that the lands allotted to Indians were to receive more water than other lands.

Likewise the legend on the map, Exhibit 21 (R. 478) does nothing more than indicate that the construction would commence in areas where there were large percentages of allotted lands and does not indicate any distinction between the allotted and surplus unallotted lands so far as quantum of right is concerned.

We submit that to construe the Act of May 29, 1908 (35 Stat. 448) as giving preferential rights to Indian allotments is contrary to the whole purpose of the act; reaches an absurd result in light of the history and the general purpose of the Act and particularly in light of the duties placed on the purchasers of the surplus lands; is directly contrary to the administrative construction of the Act; and reaches a result which will destroy the investments of hundreds of purchasers of reservation lands.

Consequently we urge that neither of Theories No. 3 or 4 should be applied as the measure of the rights in this case.

Theories Nos. 5 and 6—A Pro Rata Share.

These theories raise the question of whether the defendants, whose lands with a Secretarial right pay no construction costs, should be entitled to share in stored water. (See Ex. 8, R. 280 and R. 390). As indicated in the Statement of facts the stored water is water which would not be available in the absence of the dams and pumping systems which save it. Certainly on the plainest principles of equity the defendants should not be entitled to water saved and stored at the expense of Dellwo and the other persons who have to pay the hundreds of thousands of dollars which made

the storage possible. Hence, we urge that Theory No. 6 which gives each irrigable acre of the defendants' lands exactly the same right as each other irrigable acre on the project, except that it does not give defendants a right to water which is saved at someone else's expense, is the theory which should be adopted. If it is adopted, then on the basis of the 1935 to 1939 supply, defendants would be entitled to .70 acre feet per acre instead of 3.37 acre feet which the McDonald-Deschamps defendants took, or the 8.76 acre feet which the Magee-Minesinger defendants took. (See p. 12 of this brief).

III. The Court Had Jurisdiction.

The District Court dismissed the complaint and the complaint in intervention because of a want of parties, apparently in reliance upon the case of *U. S. v. Powers* (CCA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330.

We believe that the court improperly construed that decision. The law as to joinder of parties is settled by the exhaustive opinion of this court in the case of *State of Washington v. U. S.*, (CCA 9, 1936), 87 F. (2d) 421, wherein the court stated three classes of parties: formal, necessary and indispensable. The court then outlined the method for determining whether or not an absent party is indispensable, as follows:

“From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court

render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable."

Applying this test to the absent parties, here, viz., the other landowners on the reservation, what do we find? Are the absent parties interested in the controversy? The answer is that they are to the extent that the amount of water taken by defendants affects the amount available for them. Finding an interest we then proceed to the numbered questions.

(1) Is the interest of the absent party distinct and severable? The answer is yes. The lands of the absent parties are separate lands. There is no joint ownership of any kind. There are no legal relations of any kind between the defendants and the absent parties.

(2) In the absence of such parties, can the court render justice between the parties before it? The answer is yes. The court has all of the information which is necessary to determine whether the defendants have taken more water than they are entitled to take or have taken it contrary to the lawful method. By determining the defendants' rights and by preventing them from exceeding those rights, the court can do justice to the United States and to the inter-

veners and still allow defendants all the water to which they are entitled.

(3) Will the decree made in the absence of such party have no injurious effect on the interest of such absent party? The answer is yes. If the defendants are enjoined from taking any water or more water than they are entitled to the effect of the decree will be to make more water available for the absent parties.

(4) Will the final determination in the absence of such a party be consistent with equity and good conscience? The answer is yes. The absent parties stand to lose nothing and to gain something. The more water taken by the defendants, the more water wasted because of uncontrolled diversions, the less water for the absent persons. At present defendants are taking quantities of water to which they are not entitled under any theory.

The only way in which the landowners not parties to this suit can be affected by it, is by the determination of the rule of law which fixes the quantity of water rights on the reservation. Owners of Secretarial rights not present and owners of farm units and allotted lands will be affected by the rule of law established, but only insofar as the doctrine of *stare decisis* is operative. In every case the determination of a rule of law affects many people not before the court, because almost every case involves problems common to many classes of people. Thus the gold clause cases declared a rule which touches all of our lives and yet it was not necessary that we all be parties. Hence, there is no reason why any parties other than those now before the court need be joined.

Even if the absent parties are necessary parties, as that term is defined in *State of Washington v. United States*, supra, the court erred in dismissing the complaints because of their absence. As pointed out in the decision:

“In all cases where it shall appear to the court that persons, who might otherwise be deemed *necessary or* proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties.”

Under the circumstances here all of the land owners on the reservation literally cannot be made defendants.

Here we have a large and extensive system of irrigation built by the government at large expense. It is a fair inference that substantially all of the water users conform to the government's rules limiting each user to his proportion of the water available each year. If a dozen or sixteen out of the thousands of users help themselves to excessive quantities, has the Government no relief against these few without naming as defendants the thousand or more others with whom it has neither difficulty nor dispute? Apparently, in the lower court's view, if the Government were to attempt such a feat, and if, while the list of a thousand or more defendants were being compiled and typed, one of these non-resisting defendants died leaving several heirs who were thus omitted as defendants, the whole proceeding must fail!

Furthermore the joinder of every landowner on the reservation would be completely useless. The right to the use of water on the Flathead is necessarily a right to a certain proportion of the water, whatever that proportion may be. In this, the right is totally different from the rights granted where the doctrine of appropriation applies, for there each party is assigned a definite quantity of water which he may take without regard to the available amount, so long as he respects the prior rights. If the water available must be distributed justly and equally over a given quantity of land, then in the nature of things there can be no general determination that any acre is entitled to any definite quantity of water. The amount of water available varies from year to year depending on the precipitation, and if in 1935 there are 200,000 acre feet available and in 1936 but 175,000 acre feet, it follows that the amount for each acre is less in 1936 than in 1935. If therefore plaintiff had joined all of the many hundreds of landowners on the reservation, all that the court could possibly do would be to fix the rule of law according to which the water should be distributed, and if the court attempted to assign a definite quantity to each landowner, the gods of the weather would simply set aside such assignment. Thus, between 1935 and 1939, the amount of water per acre available on the Mission Valley Division varied from a low of .96 acre feet in 1937 to a high of 1.27 acre feet in 1936. (Ex. 19, R. 401). For these reasons we urge that the superhuman task of making every landowner on the reservation a party is not only unnecessary but would be completely futile.

Thus we come to the case of *United States v. Powers*,

(CCA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 83 L. Ed. 330, 57 S. Ct. 344.

The District Court apparently fell into error here by failing to realize that there were two separate issues in the *Powers* case:

1. The complaint of the United States to enjoin the defendants from taking *any* water.
2. The cross-complaints of the defendants seeking a definite adjudication of a quantity of water.

This court held that the defendants, in diverting water, were not trespassers and that the United States was not entitled to an injunction. There was no evidence to show that defendants had diverted more than their share of the water and since they had some right, an injunction could not possibly issue.

The court *after* disposing of the question of the injunction then dismissed the judgment awarding a fixed quantity of water to defendants because such adjudication did clearly affect those not parties. If defendants were awarded one-half a miner's inch per acre (3 acre feet in an irrigation season of 120 days) and there was not that amount for other landowners, clearly those others were adversely affected. The court did not hold, and we submit would not have held, that an injunction could not issue if the United States had shown an unjust and unequal use by defendants.

The Supreme Court affirmed the decision of this court, denied the injunction, and said:

“The petitioners have shown no right to the injunction asked. We do not consider the extent or precise nature of respondent's rights in the water. The present proceeding is not framed to that end.” (305 U. S. 533).

It is to be noted that both this court and the Supreme Court did establish the rule of just and equal distribution notwithstanding the absence of all of the landowners on the Crow Reservation. Clearly the complaint of the United States was dismissed for failure to prove that the defendants were not entitled to any water and the dismissal for lack of parties related to defendants' attempt by cross-complaint to secure a specific quantity of water for their lands.

We therefore submit that,

- (1). under the rules relating to parties, there is no jurisdictional lack of indispensable or necessary parties here,
- (2). the joinder of additional parties would be a useless procedure, and
- (3). the *Powers case* is not authority for dismissal in this case.

The decision of the court below is anomalous. While it dismissed the suit without prejudice for want of jurisdiction to proceed in the absence of additional parties, it nevertheless made extensive findings as to the rights of the parties. If the court was right as to its want of jurisdiction it was certainly in error in making such findings, as pointed out in Specification of Error No. XII.

CONCLUSION

We therefore respectfully urge that the court has jurisdiction; that it should declare that defendants are entitled to no more than their pro rata per acre share of the waters of the Mission Valley Division, after deducting stored water, to the same extent as all other users on the reservation; that defendants should be enjoined from taking more than

such share since they have taken, and intend to continue to take more water than they are entitled to under any theory; and that they should be enjoined from taking water except as it is delivered or measured to them by the project officers.

Respectfully submitted,

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APPENDIX

(Much of the legislation here in question was enacted either by way of rider to appropriation bills or as a part of extensive acts relating to Indian Affairs. For that reason most of the legislative provisions quoted in this appendix are but portions of the acts from which they are taken. In each such case the quoted language is preceded and followed by stars.)

ACT OF APRIL 23, 1904.

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect,

appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agriculture land of the first class; second, agriculture land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while

actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in

good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided*, That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12. That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for

Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

SEC. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall

be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

SEC. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904. (33 Stat. L., p. 302.)

* * * * *

FROM ACT OF JUNE 21, 1906.

FLATHEAD RESERVATION.

That the act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," as amended by section nine of the act of March third, nineteen hundred and five (Thirty-third Statutes at Large, page one thousand and forty-eight), be amended by adding the following sections:

* * * * *

"SEC. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water.

Approved, June 21, 1906. (34 Stat. L., p. 354.)

FROM ACT OF APRIL 30, 1908

* * * * *

For preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the act of April twenty-third, nineteen hundred and four, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and to begin the construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation.

* * * * *

Approved, April 30, 1908. (35 Stat. L., p. 83.)

FROM ACT OF MAY 29, 1908.

* * * * *

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows:

"SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and prescribed in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments, to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided*, That if any entryman fails to make such payments, or any of them, within the time stated, all rights in

and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided*, That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made: *Provided, however*, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act shall, in addition to the payment required by section nine of said act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

“The entryman of lands to be irrigated by said system shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

“A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments therefor are made.

“All applicants for water rights under the systems constructed in pursuance of this act shall be required to pay

such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this act as well as of any moneys already paid thereon.

“The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be disposed of under the terms of this act and at such price and on such conditions as the Secretary of the Interior may determine, but not less than the cost originally fixed.

“The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

“When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for such construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.

“The Secretary of the Interior is hereby authorized to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect.”

That section fourteen of said act be, and the same is hereby, amended to read as follows:

“SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of live stock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians, and the remaining half of said money to be paid to said Indians and persons holding tribal rights on said reservation, semi-annually as the same shall become available, share and share alike: *Provided*, That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system.”

Approved, May 29, 1908. (35 Stat. L., p. 448.)

* * * * *

FROM ACT OF MAY 18, 1916.

* * * * *

PROVIDED further, That nothing contained in the Act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-four), shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, or to relieve the owners of any or all land allotted to Indians in severalty from payment of the charges herein required to be made against said land on account of construction of

the irrigation systems; and in carrying out the provisions of said section the exemption therein authorized from charges incurred against allotments purchased prior to the expiration of the trust period thereon shall be the amount of the charges or installments thereof due under public notice herein provided for up to the time of such purchase.

For continuing construction of the irrigation systems on the Fort Peck Indian Reservation, in Montana, \$100,000 (reimbursable), which shall be immediately available: Provided, That the proportionate cost of the construction of said systems required of settlers and entrymen on the surplus unallotted irrigable land by section two of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page five hundred and fifty-eight), shall be paid as herein provided: Provided further, That nothing contained in said Act of May thirtieth, nineteen hundred and eight, shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, and the purchaser of any Indian allotment to be irrigated by said systems purchased upon approval of the Secretary of the Interior before the charges against said allotment herein authorized shall have been paid shall pay all charges remaining unpaid at the time of such purchase, and in all patents or deeds for such purchased allotments, and also in all patents in fee to allottees or their heirs issued before payment shall have been made of all such charges herein authorized to be made against their allotments, there shall be expressed that there is reserved upon the lands therein described a lien for such charges, and such lien may be enforced, or upon payment of the delinquent charges may be released by the Secretary of the Interior.

For continuing construction of the irrigation systems on the Blackfeet Indian Reservation, in Montana, \$25,000 (reimbursable), which shall be immediately available: Provided, That the entryman upon the surplus unallotted lands to be irrigated by such systems shall, in addition to compliance with the homestead laws, before receiving patent for the

lands covered by his entry, pay the charges apportioned against such tract as herein authorized, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture to the United States of all rights acquired under the provisions of this act, as well as of any moneys paid on account thereof. The purchaser of any Indian allotment to be irrigated by such systems, purchased upon approval of the Secretary of the Interior, before the charges against said allotment herein authorized shall have been paid, shall pay all charges remaining unpaid at the time of such purchase and in all patents or deeds for such purchased allotments, and also in all patents in fee to allottees or their heirs issued before payment of all such charges herein authorized to be made against their allotments, there shall be expressed that there is reserved upon the lands therein described a lien for such charges, and such lien may be enforced, or, upon payment of the delinquent charges, may be released by the Secretary of the Interior.

The work to be done with the amounts herein appropriated for the completion of the Blackfeet, Flathead, and Fort Peck projects may be done by the Reclamation Service on plans and estimates furnished by that service and approved by the Commissioner of Indian Affairs: Provided, That not to exceed \$15,000 of applicable appropriations made for the Flathead, Blackfeet, and Fort Peck irrigation projects shall be available for the maintenance, repair, and operation of motor-propelled and horse-drawn passenger-carrying vehicles for official use upon the aforesaid irrigation projects: Provided further, That not to exceed \$7,500 may be used for the purchase of horse-drawn passenger-carrying vehicles, and that not to exceed \$1,500 may be used for the purchase of motor-propelled passenger-carrying vehicles.

That the Secretary of the Interior be, and he is hereby, authorized and directed to announce, at such time as in his opinion seems proper, the charge for construction of irrigation systems on the Blackfeet, Flathead, and Fort Peck Indian Reservations in Montana, which shall be made against each acre of land irrigable by the systems on each of said reservations. Such charges shall be assessed against the

land irrigable by the systems on each said reservation in the proportion of the total construction cost which each acre of such land bears to the whole area of irrigable land thereunder.

On the first day of December after the announcement by the Secretary of the Interior of the construction charge the allottee, entryman, purchaser, or owner of such irrigable land which might have been furnished water for irrigation during the whole of the preceding irrigation season, from ditches actually constructed, shall pay to the superintendent of the reservation where the land is located, for deposit to the credit of the United States as a reimbursement of the appropriations made or to be made for construction of said irrigation systems, five per centum of the construction charge fixed for his land, as an initial installment, and shall pay the balance of the charge in fifteen annual installments, the first five of which shall each be five per centum of the construction charge and the remainder shall each be seven per centum of the construction charge. The first of the annual installments shall become due and payable on December first of the fifth calendar year after the initial installment: Provided, That any allottee, entryman, purchaser, or owner may, if he so elects, pay the whole or any part of the construction charges within any shorter period: Provided further, That the Secretary of the Interior may, in his discretion, grant such extension of the time for payments herein required from Indian allottees or their heirs as he may determine proper and necessary, so long as such land remains in Indian title.

* * * * *

The cost of constructing the irrigation systems to irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.

That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the owners of the irrigable land. Such charges when collected shall be available for expenditure in the maintenance and operation of the systems on the reservation where collected: Provided, That delivery of water to any tract of land may be refused on account of nonpayment of any charges herein authorized, and the same may, in the discretion of the Secretary of the Interior, be collected by a suit for money owed: Provided further, That the rights of the United States heretofore acquired, to water for Indian lands referred to in the foregoing provision, namely, the Blackfeet, Fort Peck, and Flathead Reservation land, shall be continued in full force and effect until the Indian title to such land is extinguished.

That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the provisions of this Act, and he is hereby authorized and directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land: Provided, That if water be available prior to the announcement of the charge herein authorized, the Secretary of the Interior may furnish water to land under the systems on the said reservations, making a reasonable charge therefor, and such charges when collected may be used for construction or maintenance of the systems through which such water shall have been furnished.

* * * * *

Approved May 18, 1916 (39 Stat. 139).

FROM ACT OF MAY 11, 1926

* * * * *

For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, \$575,000: PROVIDED, That of the total amount herein appropriated not to exceed \$15,000 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, \$100,000; Moiese Canal enlargement, \$15,000; South Side Jocko Canal, \$40,000; Hubbart Feed Canal, \$7,500; Camas A Canal, \$2,500; continuing construction of power plant, \$395,000, of which sum \$15,000 shall be immediately available for additional surveys and preparation of plans: PROVIDED FURTHER, That no part of this appropriation, except the \$15,000 herein made immediately available, shall be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance

costs within the entire project. Provision shall also be contained therein requiring payment of operation and maintenance charges annually in advance of each irrigation season and prohibit the granting of a water right to or the use of water by any individual for more than one hundred and sixty acres of land irrigable under constructed works within the project after the Secretary of the Interior shall have issued public notice in accordance with the Act of May 18, 1916 (Thirty-ninth Statutes at Large, pages 123-130); all lands, except lands owned by individual Indians, at the date of public notice in excess of one hundred and sixty acres not disposed of by bona fide sale within two years after said public notice shall be conveyed in fee to the United States free of encumbrance to again become a part of the public domain under contract between the United States and the individual owners at the appraised price fixed at the instance of the Secretary of the Interior, such amount to be credited in reduction of the construction charge against the land within the project retained by such owner. All lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, to which shall be added such amount as may be necessary to cover any accruals against the land and other costs arising from conditions and requirements prescribed by said Secretary: PROVIDED FURTHER, That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts: PROVIDED FURTHER, That all construction, operation, and maintenance costs, except such construction costs on the Camas Division held and treated as a deferred obligation herein provided for, on this project shall be, and are hereby, made a first lien against all lands within the project, which lien upon any particular farm unit shall be released by the Secretary of the Interior after the total amount charged against such unit shall have been paid, and a recital of such lien shall be made in any instrument issued prior to such release by the said Secretary. The contracts executed by such district or districts shall

recognize and acknowledge the existence of such lien: PROVIDED FURTHER, That pending the issuance of public notice the construction assessment shall be at the same rate heretofore fixed by the Secretary of the Interior, but upon issuance of public notice the assessment rate shall be 2½ per centum per acre, payable annually, in addition to the net revenues derived from operations of the power plant as hereinbefore provided, of the total unpaid construction costs at the date of said public notice: PROVIDED FURTHER, That the public notice above referred to shall be issued by the Secretary of the Interior upon completion of the construction of the power plant.

* * * * *

(Approved May 11, 1926, 44 Stat. 464.)

REPORT NO. 1189—60th Congress, 1st. Session
AMENDING AN ACT OPENING TO SETTLEMENT
THE FLATHEAD INDIAN RESERVATION IN
THE STATE OF MONTANA.

March 7, 1908—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Hackney, from the Committee on Indian Affairs, submitted the following

REPORT

(To accompany S. 3640)

The Committee on Indian Affairs, having under consideration the bill (S. 3640) to amend sections 9 and 14, Chapter 1495, of the Statutes of the United States entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana and the sale and disposal of all surplus lands after allotment," report the same back with amendments, with the recommendation that the same as amended do pass. The amendments are as follows:

On page 4, line 6, strike out the word "sixty," and insert in lieu thereof the word "forty."

On page 5, strike out all of lines 12 to 22, inclusive, and insert in lieu thereof the following:

The land irrigable under the systems herein provided which has been allotted to Indians in severalty,

shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

On page 5, line 24, before the word "land," insert the word "unallotted."

On page 6, line 5, after the word "Interior," strike out the remaining part of line 5, and also strike out all of lines 6, 7, 8, 9, 10, and 11.

On page 7, at the end of line 11, insert the following words:

Provided, That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of the irrigation system.

The reasons for the proposed legislation may be briefly stated as follows: The Fifty-eighth Congress passed an act allotting to the Indians of the Flathead Reservation in Montana their lands in severalty, and provided for the sale of the surplus lands. Under the original act the Secretary of the Interior, as trustee, was authorized to use one-half of the proceeds from the sale of lands in the construction of irrigation systems on this reservation. Recent surveys made under the direction of the Secretary of the Interior have developed the fact that a large portion of these lands can be successfully and cheaply irrigated. Appropriations have been made by Congress for the preliminary irrigation work, and the pending Indian appropriation bill carried an additional sum for the completion of the survey and the beginning of the construction work. The moneys expended by the Government, however, are to be reimbursed out of the proceeds of the sale of the land. The provisions of this amendment give the Secretary the right to use all the proceeds of the sales until the irrigation sys-

tems have been constructed, the remaining moneys to be divided among the Indians as provided in the original act.

The provisions of the original act were found also to be insufficient to provide for the apportionment of the cost of the construction of the irrigation system to the various tracts of land and also to provide for the apportionment of the cost of operation and maintenance of the system after its completion. By the terms of this act the lands which may be allotted to the Indians will not be charged with any of the cost of the construction of the irrigation system, but their proportionate part of the cost of construction will be taken out of the general fund by the Secretary of the Interior. The lands to be sold to settlers will be charged with their proportionate cost of this irrigation system, and this will be payable in fifteen annual installments. Various other matters of detail respecting the water rights are covered by the bill.

As the bill passed the Senate and came to the House it undertook to release the Indians from the payment of their proportionate share of the cost of operation and maintenance of the irrigation system. On the hearing of the bill before this committee it was developed that in all probability three-fourths of the irrigable lands would be allotted to Indians, and it was seen that in all probability the great burden of maintenance of this extensive irrigation system might be thus thrust upon a very few of the purchasers of land, and, such being the case, no prudent purchaser would feel like investing his money in the purchasable land when the cost of maintenance would be so unevenly adjusted as to throw the entire charge upon him, and in some cases the charge might be sufficient to cover the entire value of his land. The attention of the author of the bill, together with the Indian Office, was brought to this matter by your committee, and, after careful consideration of all the facts and circumstances, the five amendments proposed by your committee and submitted herewith were agreed upon. As a result of these amendments your committee is of the opinion, and this opinion is shared in by the Reclamation Service and by the Commissioner of Indian Affairs, as well as the author of the bill in the Senate, that the irrigation system can be carefully constructed, the cost thereof equitably ad-

justed, and the cost of maintenance and operation will be evenly distributed to the various owners of irrigable lands. The Flathead Reservation, where the irrigation system will be constructed, embraces an area of very fine land especially adapted by reason of soil and climatic conditions to the growth of small fruits and grain.

Your committee beg leave to call the attention of the House to the letter from the Secretary of the Interior advocating the passage of this measure, which is printed in full in the report of the Senate Committee on Indian Affairs, being Report No. 65.

The committee therefore recommends the adoption of the five amendments and recommends that the bill pass as amended.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

-VS-

B. W. ALEXANDER, BECKWITH MERCANTILE
COMPANY, a Montana Corporation, JOHN A. HAZEL,
THEODORE KNUTSON and EDNA I. KNUTSON, his
wife, P. W. SORENSON, AVERY A. STEVENS, MEIL
C. PIERCE, BERT LISH, BERT MYERS NELSON,
JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON,
JOHN MINESINGER and ADA B. MINESINGER, his
wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation,
and DENNIS A. DELLWO,

Appellants,

-VS-

B. W. ALEXANDER et al,

Appellees.

Upon Appeal from the District Court of the
United States for the District of Montana

BRIEF FOR APPELLEES

LLOYD I. WALLACE
Polson, Montana
Attorney for Appellees



MISSOULIAN

PAUL P. O'BRIEN,

CLERK

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SEP 1 1942

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

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B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSON, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

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Attorney for Appellees

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APPELLEES' STATEMENT OF CASE

Appellees regard the statement of the case as made on behalf of appellants, Flathead Irrigation District and Dennis A. Dellwo, as inaccurate in several particulars and misleading in others and, also, incomplete. For instance:

At page 8 of said appellant's brief, it is said: "The Flathead Irrigation District . . . will, upon final collection of the cost of construction of the system from the farmers who own lands in the District, become the owner of the Flathead Irrigation Project." The Flathead Irrigation District will only become the owner of that portion of the Project located within that particular District. The Mission Irrigation District and the Jocko Irrigation District will, likewise, become the owners of those portions of the Flathead Irrigation Project located within such Districts respectively.

Again at Page 8 it is said: "The defendants are all successors in interest of Indian allottees." The defendants, John Minesinger and Ada B. Minesinger, are Indians and allottees. The Complaint in Intervention was dismissed as to them but they are still defendants in the original Bill of Complaint filed by the United States.

Also, at page 14, it is said: "All parties using water under the Project system, regardless of their location on the reservation, pay alike for water (R. 403) and receive, as nearly as possible, equal amounts." The record shows that the operation and maintenance costs vary between the Flathead Irrigation District and the Mission Irrigation District principally on account of the fact that the administrative expenses vary and that the collections vary in the two Districts by reason of delinquencies in payments. (R.

415). The record also shows that, while the farmers pay equal amounts for water received, yet some farmers receive one and one-half to two times as much water as another and sometimes more, and yet pay the same amount of money. In other words, it has been the policy of the Project to deliver twice as much (or more) water to farmers owning lands containing gravelly soils as it does to those farmers owning lands containing tighter soils and this policy has been general throughout the entire Project (R. 416 and 423 to 429 inclusive). This is not, by any means, a "just and equal distribution" but is a discrimination. This policy or practice of discrimination has caused considerable dissatisfaction over the system (R. 425).

Also it is stated at Page 15 of appellants' brief, "The defendants . . . have actually, by the removal of dams, prevented the Project employees from administering the water (R. 452)." It was not in the evidence and it is not in the record that the defendants, or any of them, removed any dams (R. 452).

The Duncan McDonald allotment, No. 561, now owned by the appellee, B. W. Alexander, lies higher up on the mountain side and above the Pablo Feed Canal and none of said land can be irrigated except with water diverted to it from Post Creek, through the McDonald-Deschamps ditch. (R. 533-534).

There is no Government ditch from which the north thirty acres of the Edward Deschamps allotment, No. 783, now owned by the appellee, Avery A. Stevens, can be irrigated (R. 562). And there is no Government ditch serving the south fifty acres of said allotment now owned by the appellee, Meil C. Pierce. Mr. Pierce did use some water from

June Creek, flumed across the Pablo Feed Canal and turned into a draw where he was able to capture part of the water, but that flume was taken out eight or ten years ago so that the only water available to him for irrigation is from Post Creek through the McDonald-Deschamps ditch (R. 566).

None of the appellees diverted more water from Post Creek through the private ditches than was actually required to properly irrigate their respective lands, and none of the appellees unnecessarily wasted any of the waters so diverted by them.

The lands served by the McDonald-Deschamps ditch all lie above the Government B Canal, and the lands served by the Magee-Minesinger ditch (with the exception of a portion of the Thomas Wald land) all lie above the Government C. Canal, and all the customary "lost" water from the irrigation operations of the appellees is picked up by one or the other of these Government canals. The customary "lost" water from the Alexander land is picked up by Government A Canal, also known as the Pablo Feed Canal. So that none of the waters diverted by the appellees from Post Creek, to irrigate their respective lands, is wasted or squandered, and even the customary "lost" waters from their irrigation operations is recaptured. An advantageous position for all parties.

Most of the appellees paid large prices for their respective lands and each of them were influenced in purchasing their lands by reason of their understanding that the lands had free or private water rights attached, and a part of the purchase price paid in each instance was paid for the private ditch and water.

The appellee, Thomas Wald, during the administrations

of Mr. Crow and Mr. Moody, as Project Engineers, tried to and did conserve water on the project by using for irrigation purposes early in the spring of each year from Government C Canal, waters rising from springs located south and east from his land and flowing into C Canal, and otherwise flowing down the canal and out of a waste gate to become lost, and by not diverting as much water from Post Creek through the Magee-Minesinger ditch as he otherwise would have required. But during the administration of Mr. Gerharz as Project Engineer and during the present administration of Mr. Sperry as Project Engineer, Mr. Wald has not been permitted to use this water which now runs off and is lost forever (R. 586 to 589). Neither Mr. Gerharz nor Mr. Sperry denied their lack of cooperation or gave any reason for their refusal to permit Mr. Wald to use this water.

SUMMARY OF ARGUMENT

The appellees contend:

(1) That by the Treaty of 1855 with the Flathead Nation, the waters of the Reservation were reserved to the individual members of the Flathead Nation or Tribe.

(2) That each Indian who was allotted on the Reservation has a vested right, which could not be taken from him, to the use of sufficient water to irrigate his irrigable land with a priority of July 16, 1855.

(3) That the Indians and their successors are entitled to a right to use so much water as may be required to irrigate their respective allotments, prior to any rights of the holders or occupants of the surplus unallotted lands on the Reservation.

(4) That the appellees in acquiring the Indian allotments, involved in this case, with the appurtenances, have acquired whatever rights the Indians had.

(5) That the lands of the appellees require more than two acre feet of water (at the point of diversion) for the proper irrigation thereof, but that the extent or amount may not be determined in this proceeding.

(6) That the Secretary of the Interior did not act erroneously in recognizing these water rights, but that he did err in not recognizing that each individual Indian was entitled to the use of so much water as may be required to properly irrigate the whole irrigable area of their respective allotments.

(7) That water rights were allocated to each parcel of land which had been allotted to Indians in severalty by the Act of Congress of May 29, 1908 (35 Stat. 448) in an amount "as may be required to irrigate such lands." In the event that the supply of water was insufficient to furnish that amount, then the provision of the General Allotment Act requiring "just and equal distribution of the water" (25 U. S. C. A. Section 381) would be applicable.

(8) That it was and is the understanding of the Indians that the lands and waters on the Flathead Indian Reservation were reserved to them for their exclusive use and benefit by the Treaty of 1855.

(9) That the court did not have jurisdiction to grant injunctive relief.

ARGUMENT

1. *Waters reserved to individual Indians.*

The Supreme Court, in *Winters vs. United States*, 207

U. S. 564, 28 Sup. Ct. 207, in establishing the law that the “Indians” reserved the waters, at page 576 of the opinion, says:—

“The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such, the original tract was too extensive; but a smaller tract would be inadequate without a change of conditions. The lands were arid, and, without irrigation, were practically valueless.”

Winters vs. United States,
207 U. S. 564, 28 Sup. Ct. 207.

And the opinion of this Court in the decision appealed from reads, in part:—

“We are of the opinion that it was the intention of the treaty to reserve sufficient waters of Milk River, as was said by the Court below ‘to insure to the Indians the means wherewith to irrigate their farms’, and that it was so understood by the respective parties to the treaty at the time it was signed.”

Winters vs. U. S., 143 Fed. 743, 746.

It must be noted that in these opinions “Indians” and not “tribe of Indians” are mentioned. Nowhere is it stated that the “tribe” retained the right to use the waters of Milk River.

This Court, in the case of U. S. v. Conrad Investment Company, 156 Fed. 123, at page 127, says:—

“The government has the legal title, and, while it may be said to hold the lands in trust for the Indians who are in the occupancy thereof for permanent homes (Act Congress May 1, 1888, c. 213, 25 Stat. 113), yet it is their guardian and protector, and is bound by the

policy it has adopted and long maintained towards them to conserve their rights and interests until released from guardianship; it being designed that eventually its release shall come through allotments in severalty in pursuance of the general allotment act of February 8, 1887 (24 Stat. 388, c. 119.)”

And at page 129:

“... The lands being arid, the need of water is manifest, and so it must be considered that it was likewise designed that the Indians should have and enjoy the use of water in available streams wherever their needs might require, . . . And Major Dare, the agent in charge, tells us that about 90 percent of the Indians on the reservation have taken up separate settlements. This denoted progress in the way of the government’s policy, and gives promise that its full hopes may yet be realized. Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art. The government, however, being their guardian, has a most important trust to perform in this relation; that is, so to conserve the waters of such streams as traverse or border the reserve as to supply the Indians fully in their probable, or, I might say, even possible future needs, when they have ultimately secured their allotments in severalty.”

In the entire opinion no reference is made to the right of the Indians as a “tribe” to any water on the reservation.

In *Conrad Inv. Co. v. U. S.*, 161 Fed. 829, 831, the Court in commenting upon its decision in the *Winters* case said:—

“That the United States, by treaties with the Indians on the reservation, had impliedly reserved the waters of Milk River for the benefit of the Indians on the reservation to the extent reasonably necessary to enable them to irrigate their lands, and that the ‘set-

tlers on public lands outside of the reservation could not acquire . . . the right to divert the waters of Milk river to the prejudice of the rights of the Indians residing upon that reservation'."

No reference was made to the rights of the Indians as a tribe.

In *Skeem v. United States*, 273 Fed. 93, no mention is made of any rights of the tribe. Only rights of individual Indians were considered.

The same is true of *U. S. v. Parkins*, 18 Fed. (2d) 642; *U. S. v. Hibner*, 27 Fed. (2d) 909 and *Scheer v. Moody*, 48 Fed. (2d) 327.

The *Winters* case holds that the waters were reserved for use on the arid lands of the reservation so that the Indians could make their living as an agricultural and pastoral people; and that without irrigation these lands were valueless.

It was not contemplated that the agricultural and pastoral pursuits should be carried on as a tribe, or that there should be any communistic farming. On the contrary, the treaties provide that the lands should be allotted in severalty.

Prior to the enactment of the allotment acts, the Indians held tribal land in common. No individual Indian had a right to any particular property, and hence he had no right to any particular quantity of water. He had no right to alienate any property because he had no ownership in severalty; and when he died, his rights in the lands, the waters, and the occupancy and use of both ceased, for the reason that no member held title to a particular described piece of land.

The General Allotment Act of February 8, 1887, (24 Stat. 388, 25 U. S. C. A. 381) provided for the allotting of the lands of the Reservation among the Indians in severalty, and the same Act provided that where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe rules and regulations to secure a just and equal distribution of water among the Indians residing on said reservation. Certainly a distribution to the individual Indian was intended and not a distribution to the tribe as a whole.

2. *Vested Rights.*

In negotiating the Treaty, the Government requested and the Indians agreed to give up a life of hunting and fishing, wherein a large undivided tract was necessary, and to accept a smaller reservation wherein they were to change their mode of living to that of an agricultural and pastoral people. The Winters case holds that even though water was not mentioned in the Treaty, there was an implied agreement that the water, necessary to permit the Indians to adopt the new mode of living, was reserved to them. No other construction of the Treaty could be possible. By the Treaty, the land and the water were reserved to the Indians with the promise that the Indian could make a selection of the land he desired to farm as an individual and the Government promised to cause the agricultural lands to be properly surveyed, allotments made to the Indians in severalty, and to issue patents therefor.

The survey was made, the allotments made and patents issued. The Indian was given his allotment so that he might farm for himself, become an individualist and adopt an ag-

ricultural and pastoral life. If it was the intention of the Treaty to reserve the water so that the Indians could make a living as farmers, then, when the Indian was given his individual land, how could he be expected to make his living on this arid land without the water to permit him to lead this pastoral and agricultural existence. Certainly he was given the water with the land. It was the policy of the Government that when the Indians received their allotments, that they should become irrigation farmers.

This Court, in the McIntire case, said this:—

“The waters of Mud Creek were impliedly reserved by the treaty to the Indians. *Winters v. United States*, 207 U. S. 564, 577; *United States v. Powers* (C.C.A. 9), 94 F. (2d) 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. *Minnesota v. Hitchcock*, 185 U. S. 373, 387.”

U. S. v. McIntire, 101 F (2d) 650.

Judge Pray, in his decree made in the Powers case, said this:—

“ . . . that the Crow Indians in their treaty with plaintiff of May 7, 1868, reserved the right to the use of the waters of Little Big Horn River, Lodge Grass Creek and their tributaries to the extent necessary to (275) irrigate all lands on the Crow Indian Reservation which are irrigable from said streams or any of them; that the rights so reserved have continued to exist against the United States and in favor of individual Indians and their grantees and successors in interest”

U. S. v. Powers, 16 Fed. Supp. 155.

And this Court in the same case, in affirming the decision of Judge Pray, stated as follows:—

“The Crow Indian Reservation was established by a

treaty between appellant and the Crow Indians (dated May 7, 1868) (15 Stat. 649). There was in the treaty no express reservation of water for irrigation or other purposes. There was, however, an implied reservation. *Winters v. United States*, 207 U. S. 564, 575. The implied reservation was to the Indians, not to appellant. *Skeem v. United States* (C. C. A. 9), 273 F. 93, 95; *Conrad Investment Co. v. United States* (C. C. A. 9), 161 Fed. 829, 831; *Winters v. United States* (C. C. A. 9), 143 F. 740, 745; affirmed in 207 U. S. 564."

U. S. v. Powers, 94 F. (2d) 783.

And the Supreme Court of the United States, in the same case, stated:—

"Respondents maintain that under the Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters v. United States*, 207 U. S. 564) and that when allotments of land were duly made for exclusive use and thereafter conveyed in fee, the right to use some portion of tribal waters essential for cultivation passed to the owners.

The respondents' claim to the extent stated is well founded."

U. S. v. Powers, 59 Sup. Ct. 344.

The right to the water was retained by the Indians in the Treaty of July 16, 1855. The water was for use on the lands of the reservation, to make it an agricultural and pastoral country. When the land was allotted to the individual Indian, the water, following the intention of the Treaty as construed by the *Winters* case, went with the land to the individual Indian. When the patent was issued it simply gave legal form to the rights which were contained in the Treaty and confirmed by the allotments and the subsequent action of the Government. The water became appurtenant to the land when the Indian received his allotment. It is significant that the patents make no attempt to reserve the

water, although they do reserve other rights which the United States intended to retain (R. 489). The Government patents for these lands convey the same "together with all the rights, privileges, immunities and appurtenances, of whatsoever nature, thereunto belonging." In the patents there is a reservation for right of way of canals constructed by the authority of the Government, but no specific reservation of water rights. In the later deeds of conveyance, no reservation of water was made. The rights which were appurtenant to the land were conveyed by both the patent and the later deeds of conveyance. These appellees have all the rights of the original patentees.

Kofoed v. Bray, 69 Mont. 78, 220 Pac. 532.

McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648.

Sloan v. Glancy, 19 Mont. 70, 47 Pac. 334.

Once these rights have been conferred upon the Indian, neither the Secretary of the Interior, the Commissioner of Indian Affairs nor Congress can abrogate or take them away.

"It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by Statute."

Choate v. Trapp, 224 U. S. 665, 674—32 Sup. Ct. 565.

"There is a broad distinction between power to abrogate a statute and to destroy rights under it; and, while Congress under its plenary power over Indian tribes can amend or appeal an agreement by a later statute, it cannot destroy actually existing individual rights of property acquired under a former statute or agreement."

(Syllabus 1.)

"Indians are not excepted from the protection guar-

anted by the Federal Constitution, but their rights are secured and enforced to the same extent as those of other residents or citizens of the United States." (Syllabus 10.)

Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565.

In the case of Morrow v. U. S., 243 Fed. 854, 856, the Circuit Court of Appeals for the 8th Circuit says:

"There is no question that the government may, in its dealings with the Indians, create property rights which, once vested, even it cannot alter. Williams v. Johnson, 239 U. S. 414, 420, 36 Sup. Ct. 150, 60 L. Ed. 358; Sizemore v. Brady, 235 U. S. 441, 449, 35 Sup. Ct. 135, 59 L. Ed. 308; Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949; Jones v. Meehan, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; Chase v. U. S., 222 Fed. 593, 596, 138 C. C. A. 117. Such property rights may result from agreements between the government and the Indian. Whether the transaction takes the form of a treaty or of a statute is immaterial; the important considerations are that there should be the essentials of a binding agreement between the government and the Indian and the resultant vesting of a property right in the Indian."

The right of the Indian to the use of the water would seem to be a vested legal right, because it rested on the solid basis of a binding agreement which has been fully executed. This agreement was the agreement of the Government with the Indian, as expressed in the Treaty of July 16, 1855, as interpreted by the Winters case, wherein the Government agreed, in consideration of the relinquishing of the remainder of the territory, to allot, in severalty, a portion of the remaining lands on the reservation to the individual members of the tribe.

Circuit Judge Sanborn, on the same subject of vested rights of an Indian, said:

“If by the treaty of 1865 a substantial right in or title to the land in question was granted to or vested in Clarissa Chase and her heirs, the subsequent act of Congress of 1882 was ineffective to impair or destroy that right or title because; First, Indians as well as other residents and citizens of the United States are protected by the fifth amendment to the Constitution against deprivation of property, life, or liberty without due process of law. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. *Choate v. Trapp*, 224 U. S. 665, 670, 677, 32 Sup. Ct. 565, 56 L. Ed. 941; *Jones v. Meehan*, 175 U. S. 1, 20 Sup. Ct. 1, 44 L. Ed. 49; *In re Heff*, 197 U. S. 488, 504, 25 Sup. Ct. 506, 49 L. Ed. 848; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307, 23 Sup. Ct. 115, 47 L. Ed. 183; *Jackson v. Goodell*, 20 Johns, (N. Y.) 188; *Lowry v. Weaver*, 4 McLean 82, Fed. Cas. No. 8, 584; *Whirlwind v. Vonder Ahe*. 67 Mo. App. 628; *Taylor v. Drew*, 21 Ark. 485, 487.”

Chase v. U. S., 222 F. 593, 596; reversed by U. S. v. *Chase*, 245 U. S. 89, 62 L. Ed. 89, 38 Sup. Ct. 24.

“It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by Statute.”

Choate v. Trapp, 224 U. S. 665, 674, 56 L. Ed. 941, 32 Sup. Ct. 565.

The U. S. District Court of Montana in the case of *United States v. Heinrich*, 12 F. (2d) 938, 939, in a case where many of the same questions were involved, held:

“Such patents as were issued here would, without doubt, include the water and ditch rights appurtenant to the land, although not expressly mentioned therein. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U. S. 77, 43 S. Ct. 60, 67 L. Ed. 140; *Hardin v. Jordan*, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. Ed. 428; *Packer*

v. Bird, 137 U. S. 661, 11 S. Ct. 210, 34 L. Ed. 819; Smith v. Denniff, 23 Mont. 65, 57 P. 557, 50 L. R. A. 737; Tucker v. Jones, 8 Mont. 225, 19 P. 571; McDonald v. Huffine, 44 Mont. 411, 120 P. 792.

“Rights are said to be vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. Pearsall v. Ry. Co., 161 U. S. 646, 675, 16 S. Ct. 705, 40 L. Ed. 838. ‘A vested right is an immediate right of present enjoyment, or a present, fixed right of future enjoyment.’ 4 Kent, Comm. 202.

“An Indian’s ‘right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.’ Choate v. Trapp, 224 U. S. 665, 32 S. Ct. 565, 56 L. Ed. 941.

“Titles confirmed many years before by the authorized agents of the government may not be nullified, and rights created by carrying a statute into effect cannot be divested or impaired. Gritts v. Fischer, 224 U. S. 640, 32 S. Ct. 580, 56 L. Ed. 928; Reichert v. Felps, 6 Wall, 160, 18 L. Ed. 849; Sizemore v. Brady, 235 U. S. 441, 35 S. Ct. 135, 59 L. Ed. 308; U. S. v. Rowell, 243 U. S. 464, 37 S. Ct. 425, 61 L. Ed. 848. Otherwise, where nothing had been done by officers of the government under prior act, and matter remained executory, and no vested right had attached at the time of approval of later act. U. S. v. Stockslager, 129 U. S. 470, 9 S. Ct. 382, 32 L. Ed. 785. No act of Congress or legislative fiat constitutes due process of law, whereby a vested right in or title to property may be either seriously impaired or destroyed. Chase v. United States, 222 F. 593, 138 C. C. A. 117.”

United States v. Heinrich, 12 F. (2d) 938.

3. *Indians and Successors Entitled to First Use of Water.*

From the foregoing, it has been conclusively shown that the Indian allottees were and are entitled to use a sufficient

amount as may be required to irrigate their lands, prior to any rights of the holders or occupants of the surplus unallotted lands on the reservation. The waters were reserved to the individual Indians. The right to use a sufficient amount of water became a vested right which cannot be taken away from him. The original plan of the Government project called for the irrigation of 152,000 acres (R. 479). We are told that the present plan calls for the irrigation of 138,000 acres (R. 222). We are also told that in 1938 there were 76,000 acres in the project under irrigation. This figure includes both Indian allotments and farm units, or surplus unallotted lands, but not the 8,000 acres irrigated under the so-called Secretarial Water Rights. The whole irrigable area of all Indian allotments is about 70,000 acres (R. 239). We are also told that in 1935 there was a serious shortage of water and that crops burned up for a lack of water, and that there never has been a sufficient amount of water available to properly irrigate all of the acres under irrigation (R. 457-458). The only additional water to be available will be derived from the Polson Pumping Plant—enough to irrigate a few thousand additional acres (R. 219). At the present time there is just about enough water available to irrigate the Indian allotments. Where does the water come from that is used to irrigate the farm units or surplus unallotted lands? It comes from the Indians, of course. If the Government extends the project to include a total of 138,000 acres, as they say they plan to do, where is the water coming from to irrigate this additional 62,000 acres? It will come from the waters owned by the Indians, of course. In other words, the Indians and their successors in interest are being divested of their vested rights.

We seriously urge that each irrigable acre of the Indian allotments, whether still in the ownership of the Indians or their successors, is entitled to a sufficient amount of water to properly irrigate it. If any water remains after the Indian allotments have received their required amount, then such surplus water might be used to irrigate other lands, but not before.

Section 7 of the General Allotment Act of 1887 (24 Stat. 388, 25 U. S. C. A. 381) reads as follows:

“That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.”

In the case of *U. S. v. Powers*, 305 U. S. 527, 59 Sup. Ct. 344, the Supreme Court said:—

“The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.

“Adoption by the Secretary of plans for irrigation projects to serve certain lands was not enough to indicate a purpose to exclude all other land from participation in essential water and thereby destroy the equal interest guaranteed by the Treaty. Subsequent allotments for farming followed by patents negative any such notion. The patented lands had no value for ag-

riculture without water; they were selected for homes and individual farming.”

That it was the intention of the Government in constructing the present irrigation project to so construct the same so as to irrigate the Indian allotments, not already under private irrigation development, and to deliver the required amount of water necessary for properly irrigating such Indian allotments prior to irrigating any of the farm units or surplus unallotted lands, is clearly demonstrated by the notice by James W. Witten, Superintendent of Opening and Sale of Indian Reservations, contained in the Amended Schedule of Lands in the Flathead Indian Reservation (Exhibit 33) (R. 489), which was a notice to all applicants for entry on the surplus unallotted lands or farm units. A portion of which notice is quoted herewith:

“The Government is now constructing irrigation works from which the farm units will be irrigated as far as possible, but it cannot at this time be told what part or how much of any particular unit can be furnished with water. It is probable that water can be furnished to only a small portion of some of these units, and it is possible that there will be no water at all for some of them, nor can it be told now when the water will be ready for any of these units, as the development of the irrigation projects has not yet proceeded far enough to enable the giving of definite information on this subject at this time. All applicants must bear this fact in mind and make their selections accordingly, as they will act on their own responsibility and without any guarantee from the Government, and the fact that water has not or cannot be furnished will not excuse any entryman from a full compliance with the requirements of the law as to residence, cultivation, and the payment of the Indian price.”

This right of the allottees and their successors in interest has been recognized by the Government, the Secretary of

the Interior, the Commissioner of Indian Affairs and all other persons interested, ever since the making of the Treaty of 1855 until this action was commenced. As was said in the Powers case, 305 U. S. 527, 59 Sup. Ct. 344:—

“We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes.”

4. *Appellees Acquired Indian Rights.*

The Indian allottee has a right to the use of sufficient water to irrigate his irrigable land. That right is appurtenant to the land. Upon allotment, the Indian became vested with all the rights incident to ownership, of both the lands and water, under the Treaty with a priority of July 16, 1855. When the Indian sold his land, he sold all of his interest in the land which included the water. The purchaser of the land secured all of the right of the Indian in and to the land and the water. A very lucid and a correct statement of the law is found in *United States v. Hibner*, 27 Fed. (2d) 909, as follows:

“This question is not free of difficulty, for it presents for consideration what is the status of the water rights of those who have acquired by purchase their lands from the Indians whose rights were reserved unto them, and who became vested with all the rights incident to ownership of both the lands and water under the treaties, with a priority of February 16, 1869. The right of the Indians to occupy, use, and sell both their lands and water is now recognized, as this view is sustained in the case of *Skeem v. U. S.*, supra, and, such being the case, a purchaser of such land and water right acquires, as under other sales, the title and rights held by the Indians, and that there should be awarded

to such purchaser the same character of water right with equal priority as those of the Indians.”

This Court, in deciding upon a Montana case, held that the water rights became appurtenant to the Indians’ allotments and could be sold with the land:—

“That these ditches and water rights are private property is clear. The ditches were built by and for Indians and for the lands in suit, and the water by these ditches conveyed was upon these lands used. Thus appropriated, ditches and water rights became appurtenant to the Indians’ allotments, and like the allotments themselves, their property in severalty. And as such, they could as they did convey them to plaintiffs.”

Scheer v. Moody, 48 F. (2d) 327, 330.

See also :

U. S. v. Powers, 94 Fed. (2d) 783.

5. *Appellees’ Lands Require More Water.*

The appellees contend that their lands required more than two acre feet per acre to properly irrigate them.

The appellants offered testimony to show that the appellees were actually using more than two acre feet per acre, but the undisputed evidence also shows that the appellees were not unnecessarily wasting or squandering any water. Is that not proof then, that these lands do require more than two acre feet, or that more than two acre feet can be beneficially used on appellees’ lands?

There are over 300 so-called Secretarial Water Rights on the reservation (R. 596), and about 70,000 acres of irrigable Indian allotments, part of which is still held by the Indians and part of which is now owned by white people. Each irrigable acre of the allotted land is entitled to its pro-rata share of the available water, at least to the amount re-

quired to properly irrigate it. If sufficient water is not available, then the Secretary may "prescribe rules and regulations" to secure a just and equal distribution among the Indians. Certainly he cannot authorize unjust and unequal distribution. Neither can he nor the Government take this water, that is sorely needed to irrigate allotted lands, away, and use it to irrigate other lands under the project, thus destroying vested rights.

But it was not possible to determine such pro rata share in this action. The issues were not framed to that end. To adjudicate the amount would require the presence in the action of all holders of allotments in the Mission Valley Division.

6. *The So-Called Secretarial Water Rights.*

In the Bill of Complaint of the United States it was alleged (R. 10):—

"That pursuant to the aforesaid Acts of Congress of June 21, 1906 and May 29, 1908 on November 25, 1921 the Secretary of the Interior granted a valid and subsisting water right from Post Creek to 16.8 acres of the above described tract, formerly known as the Duncan McDonald allotment No. 561, to the extent of two (2) acre feet of water per acre per annum, or a total of 33.6 acre feet per annum."

A similar allegation except as the number of acres, was made with respect to each of the Indian allotments involved in this action. Evidence was introduced in support of such allegations on behalf of the United States (R. 275-323). In the lower court the action was tried on behalf of said appellant on the theory that the so-called Secretarial Decree granted valid and subsisting water rights but now, on appeal, the Government, in its brief at page 8, states that:—

“It does not rely upon the ‘Secretarial Decrees’ and makes no attempt to sustain their validity. It contends, on the contrary, that all irrigable lands on the Flathead Indian Reservation, whether allotted or surplus, have equal water rights and that all diversions whether from Government or private ditches are to be administered by the project engineer.”

Appellees regard the position taken by the Government as a violation of the rule which requires adherence to the theory pursued in the court below. The general rule is stated in 3 C. J. at page 718, as follows:

“One of the most important results of the rule that questions which are not raised in the court below cannot be raised in the appellate court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the court below.”

See also

San Juan Light & Transit Co. v. Belen Requena 224 U. S. 89, 32 Sup. Ct. 399.

In 1912 Edward Clairmont, a Flathead Indian, wrote to the Commissioner of Indian Affairs regarding the Indians' private ditches which they had constructed with their private funds, and stated that these private rights should be protected (Exhibit 7) (R. 271 and 481). The Commissioner of Indian Affairs and the Secretary of the Interior *agreed with him* and so the Commissioner of Indians, with the approval of the Secretary of the Interior, acting under the authority of the Acts of February 8, 1887, June 21, 1906, and May 29, 1908, appointed a Commission (Exhibit 7) to make an examination of the private water developments on the reservation and to report its findings, with recom-

mendations, as to whether and to what extent the old ditches should be taken into consideration on the question of charges for construction cost. The Commission did make an examination of such private developments and made its report, with recommendations, (Exhibits 8 and 10). The Commissioner of Indian Affairs transmitted the report to the Secretary of the Interior, who approved it on November 25, 1921 (Exhibit 9).

Appellees believe that these acts of the Commissioner of Indian Affairs and the Secretary of the Interior and these exhibits constitute a recognition, so far as it goes, on the part of the Government, of the Indians' private rights already vested; but the Secretary of the Interior should have gone further. The Indian predecessors of the appellees had constructed ditches of sufficient size and carrying capacity to irrigate the whole irrigable area of their respective allotments. The Secretary of the Interior should have recognized that fact, even though some of such Indians may not have, as early as 1909, actually applied water to the whole irrigable area of their allotments. It should be remembered that the examination of the private water developments by the Commission was made as of 1909, when the Government commenced construction of its project and that these Indians had only been allotted on October 8, 1908, although the examinations made and hearings conducted were not actually performed until some years later.

7. *The Act of Congress of May 29, 1908 (35 Stat. 448).*

A portion of this Act reads as follows:

“The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as

may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems.”

This is consistent with the private rights, so far as the amount goes, because “enough to irrigate” is the limit of any private right.

Whether this Act actually “granted” any rights to the Indians, which they did not already possess, depends on the meaning of the word “deemed.” To deem, means to judge; to determine upon consideration. The primary meaning of the word is “to form a judgment; to conclude upon consideration.”

United States v. Doherty, 27 Fed. 730.

The Supreme Court of Montana has defined the word “deemed” as follows:

“The word ‘deemed’, as used in legislative expressions, has always been held to be equivalent to or synonymous with the words ‘considered,’ ‘determined,’ and ‘adjudged’.”

State ex rel Sinko v. District Court 64 Mont. 181-186, 208 Pac. 952.

In view of the meaning of the word “deemed,” it would seem that the Act did not “grant” any new rights to the Indians but “considered,” “concluded” or legally recognized the already existing rights of the Indians to the use of so much water as may be required to irrigate their lands.

This Court in the McIntire case (101 Fed. (2d) 650) said in part:

“The only provision regarding water rights pointed out is found in the Act of May 29, 1908 which provided that ‘The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as

may be required to irrigate such lands . . .’ Thus water rights were allocated to each parcel of the irrigable land in an amount ‘as may be required to irrigate such lands.’ In the event that the supply of water was insufficient to furnish that amount, then the provision of the general allotment act requiring ‘just and equal distribution’ of the water (25 USCA 381) would be applicable.”

But that language does not mean that the Court held that any new rights were “granted” to the Indians. The generally accepted meaning of the word allocate is “to distribute or assign”; “to allot.”

To allot means:

“To set apart a thing to a person as a share; to set apart a portion of a particular thing or things to some particular person; to divide or distribute as by lot; to distribute or parcel out in parts or portions, or to distribute to each individual concerned; . . . ”

3 C. J. S. 887.

Circuit Judge Wolverton defined the word “allot,” as follows:

“ ‘Allot’ is not a term of sale or grant, but of apportionment of that to which the parties are entitled as of right.”

Parr v. U. S., 153 Fed. 462-468.

The following is quoted from an opinion by the U. S. Supreme Court:

“And Mr. Justice McLean, concurring, said: ‘The language used in treaties with the Indians should never be construed to their prejudice.’ ‘To contend that the word “allotted,” in reference to the lands guaranteed to the Indians in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties. How the words of the treaty were understood by this unlettered people, rather than

their critical meaning, should form the rule of construction'."

Jones v. Meehan, 175 U. S. 1, 20 S. Ct. 1, 44 L. Ed. 49.

By passing the above portion of the Act of May 29, 1908, Congress ratified the Indians' private rights.

8. *Understanding of the Indians.*

It is, and always has been, the understanding of the Indians on the Flathead Indian Reservation that the lands and waters belonged to them (R. 621). They were given to understand that fact by the Treaty of 1855, and have so understood it ever since then. Soon after the Flathead Indians moved from the Bitter Root Valley to the Flathead Reservation, they began to use this water for irrigation purposes and the Government encouraged them in their endeavors (R. 617 to 621). They located close to the mountains near wood and along the streams of water (R. 612 and 617), and in the early years these Indians were encouraged to use these waters for irrigation by the Indian agents and other Government officials, and by the Jesuit Fathers who were working among the Indians as missionaries and cooperating with the Government in converting these Indians from a roaming people to irrigation farmers. As early as 1890 when Reverend Father Taelman, a missionary among the Indians, first visited the Flathead Reservation, the Indians in the Joeko Valley had built ditches and were using them (R. 620). By 1909 more than 300 Indian families had dug ditches and were irrigating portions of the lands upon which they had settled as evidenced by the number of the so-called Secretarial Decrees recognizing those early ditches (R. 596). And in this connection we invite the court's

attention and ask the court to take judicial notice of Volume 3 "Hearings by a Sub-Committee of the Committee on Indian Affairs of the House of Representatives," printed in 1920; and also the "Survey of Conditions of the Indians in the United States" by the subcommittee of the Committee on Indian Affairs of the United States Senate, printed in 1929. Both of these volumes are public documents. Attached hereto as Appendix "A" and Appendix "B" are extracts therefrom relating to the understanding of the Indians concerning their ownership of the waters on the reservation.

The lands on the Flathead Indian Reservation were recognized as the common property of the Indians of the Flathead Nation, under and by virtue of the Treaty of July 16, 1855. By virtue of that Treaty, as interpreted by the case of United States vs. Winters (207 U. S. 564, 28 Sup. Ct. 207), the use of the waters of said Reservation were reserved by the Indians for use on said land. The Government intended the individual Indians of the Flathead Nation to have a country upon which they could make a living by agricultural pursuit. Unless the water went with the land the purpose of the Treaty would be defeated. It was evident, even then, that certain lands of the Reservation were so situated that water from the streams could be run, by gravity, upon them for agricultural purposes.

Heretofore the Indians had made their livelihood by hunting and this mode of living need recognize no individual real estate rights. The buffalo and the deer roamed all of the country and the tribe had the right to pursue and take such game at any place on the common territory, and of taking fish in all the streams running through or border-

ing said Reservation. But when the habits of the Indians were to be changed to those of an agricultural and pastoral people and they were to make their livelihood by farming, it was very evident that a common ownership of the real estate must cease. If they were to become farmers and make their living from that source, it was necessary that they have lands capable of producing crops. In order to produce crops it was necessary that they have the irrigation water needed to grow the grain and food for themselves and their livestock.

The purpose of the Government was to break up the roaming tribal existence of the Indian and to make him a rugged individualist. He was to be encouraged to own his own individual property, farm his own land, and raise his own cattle. He was to take up the ways of the white man and become self supporting. The Government told him, by the Treaty of 1855, that from the common tribal lands he would be given an allotment which he was to possess and own in severalty. It was feared that, at first, he might not be capable of managing his own affairs and so the change was to be gradual and with the Government supervising his affairs until he was capable of managing himself.

Under the Treaty of 1855, the individual Indian was given the right to make a selection of the land he wanted. In due time a survey was to be made of the Reservation and he was to be allotted the land chosen by him, unless his selection conflicted with the rights of others. And, later, a trust patent was to be issued to him, designating the lands which were his. The title to these lands was to be held by the United States for a trust period of twenty-five years, during which period the Indians should have the right of

possession, use and occupancy of the land and all the appurtenant rights. At the end of twenty-five years, a fee patent was to be granted to the Indian, making the land his absolutely. When the lands were allotted to the individual Indian, he ceased to have an interest in the common property so divided, but took the lands allotted to him in severalty.

When he had no individual lands he had no use for individual water. When he took a parcel of ground, which was capable of irrigation, he had need for individual water for that land. The irrigable land without water was valueless. The two went together. To say otherwise is to entirely defeat the policy of the Government and the intention of the Indian, as expressed in the Treaty and the Acts of Congress, and as clearly set forth in the Winters case.

Each Indian who has retained his land and the successor of each Indian who has parted with the title to his land are entitled to sufficient water to irrigate all of his land capable of irrigation; if there was not sufficient water to irrigate all of his irrigable lands, each would then be entitled to his pro rata share of the available water. Neither the Congress nor the Secretary of the Interior nor the Commissioner of Indian Affairs could deprive any Indian or his successor of his portion of the available water. Each had a vested right, which could not be legally taken from him, to the use of sufficient water to irrigate his irrigable land.

9. *Court Did Not Have Jurisdiction to Grant Injunctive Relief.*

In the brief of appellants, Flathead Irrigation District and Dennis A. Dellwo, at page 47 it is stated that:

“It is a fair inference that substantially all of the

water users conform to the government's rules limiting each user to his proportion of the water available each year."

From the entire record a more fair and stronger inference is that the Indians and whites using free water under the so-called "secretarial decrees" and numbering over 300 are not limiting the amount of water used by them to the two acre feet for the specific number of acres designated in the "secretarial decree" nor to the amount designated by the project rules but, on the contrary, are using a sufficient amount of water to properly irrigate the entire irrigable acreage of their respective farms.

Appellees do not believe that the lower court erred in making the findings of fact complained of. The Court did not attempt to define the rights of the parties to the extent of adjudicating the exact amount of water the appellees are entitled to use but only made such findings as were necessary to enable the court to conclude that the appellants were not entitled to injunctive relief under the facts and to conclude that the complaint and complaint in intervention should be dismissed without prejudice, due to a lack of indispensable parties. It is conceded that there are a large number of users of water on the Flathead Indian Reservation, including Indians, successors to Indians and homesteaders, part of whom are located within the Flathead Irrigation Project and part of whom are located without the ambit of the Project. We submit that each of these water users is one who has such an interest in the subject-matter of the controversy that a final decree between the parties before the court cannot be made without injuriously affecting his interests or leaving the controversy in such a situa-

tion that its final determination will be inconsistent with equity and good conscience and is, therefore, an indispensable party.

The absence of indispensable parties compels the abatement of a suit in the Federal courts.

O'Neil v. Wolcott Mining Co., 174 Fed. 527.

State of Washington v. U. S., 87 Fed. (2d) 421.

U. S. v. Powers, 94 Fed. (2d) 783, 305 U. S. 527, 57 S. Ct. 344.

Accordingly, it is respectfully submitted that the judgment appealed from should be affirmed.

LLOYD I. WALLACE,

Attorney for Appellees.

APPENDIX "A"

Committee on Indian Affairs, House of Representatives,
Dixon, Mont., Tuesday, June 1, 1920.

The subcommittee met at 8:30 o'clock a. m., Hon. Homer P. Snyder (chairman) presiding.

The Chairman. This hearing here today is called as a continuation of hearings held pursuant to section 28 of the Indian appropriation bill for the fiscal year ending June 30, 1920, which authorized the Committee on Indian Affairs to make an investigation not only of the bureau at Washington, but its connections with the field, empowering the committee to swear witnesses, subpoena persons, and in any way legally conduct the investigation to get such information as may be required to make recommendations to Congress at its next session. In view of that, Mr. Sharp is called as the first witness.

STATEMENT OF MR. MARTIN CHARLO

The Chairman. What is your name and whom do you represent. What tribe of Indians do you represent?

Mr. Charlo. (interpreted by Max J. Barnaby). Martin Charlo. I represent the Flathead Nation of Indians and the chiefs.

The Chairman. You are here to make a statement of conditions?

Mr. Charlo. Yes, sir.

The Chairman. We will give you 10 minutes to make a statement in your own way.

Mr. Charlo. I have protests to make against the conditions of my water rights. I am paying for water that I do not get any benefit from. Several Indian members of the tribe have had their money taken away from them for supposed water charges. That is a point of view that is not right. The previous water that was my private water right has been taken away from me and I am being charged for the same. The Reclamation Service cut into my ditch and diverted my stream of water into the canal and is charging me for that same water. A treaty was made with me by

the white men that I was to have this water, and in that treaty I was given to understand that the water was mine. All the waters within the boundaries of the Flathead Reservation were to belong to me. I am sure that was the agreement made at that time.

I would like relief to get these water rights straightened out. At this time I have no water for my crops and am being charged for water I do not get on the crops, and the pro rata share of my money has been taken to pay for the supposed water charges. This statement I am making is true to the best of my knowledge.

APPENDIX "B"
SURVEY OF CONDITIONS OF THE INDIANS IN
THE UNITED STATES

Monday, July 29, 1929, Tuesday, July 30, 1929.

United States Senate

Subcommittee of the Committee on Indian Affairs.

St. Ignatius, Montana.

The subcommittee met pursuant to call at 2 o'clock p. m. in the Indian Hall at St. Ignatius, Mont., Senator Lynn J. Frazier, presiding.

Present: Senators Frazier (chairman), Wheeler, and Pine.

Present also: Mr. J. Henry Scattergood, Assistant Commissioner of Indian Affairs; Congressman Evans, of Montana; John Collier, secretary of the American Indian Defense Association (Inc.); and Mr. Nelson A. Mason, clerk of the committee.

The subcommittee proceeded under S. Res. 79, Seventieth Congress.

Senator Wheeler. They claim they have 120,000 acres under the irrigation system. The records show that but 33,000 are irrigated. They admit that they have a gravity flow for 80,000 acres, or over twice the acreage now in irrigation, yet for the past 15 years they have advocated a large addition to the system and propose a plan to pump water at an elevation of 325 feet through the Newell Tunnel and confiscate the tribal ownership of its power site. What do you know about that?

Mr. Lemery. It is not feasible or practical in any sense. Too much money has already been spent on the irrigation project which is of no practical use. The Indians protested from the beginning against the irrigation plan and are still protesting against it, and they maintain that the land has been practically confiscated by liens assessed against it over a period of years by reason of the irrigation system, and there are not 750 acres under the whole irrigation project that is irrigated by Indians and many thousand of

acres have been abandoned without anything growing on it. We charge that the Indian Bureau has through all these years misled Congress in all of these matters, otherwise Congress would have abandoned it years ago. It is ruining the Indians and threatening the destruction of the Flathead Valley. The construction charges, cost of maintenance, and other operations are so high now that it is impossible to raise enough on the land to pay for the water, and the accumulated charges are more than the land is worth. Land values are not high out here. I had an Indian tell me the other day that he had a quarter he was trying to sell for \$1,600; it has five or six hundred dollars' worth of buildings on it. The main ditch runs right through his land, but he cannot get any bidders, as no one wants to assume the burden of these charges assessed against the land and the purchaser would not have a good, clear title unless these liens against the land were paid. There are a great many ditches under the irrigation project that were built and never used—you go right by one on the road to this place. I don't know just how many miles of ditches and laterals were built and never used, but there are a good many, and they are building some more.

Before the Government ever started the irrigation project the Indians had their own irrigation system and the Government came in and took those irrigation ditches over and appropriated the water and tore up some of the ditches used by the Indians and then they turned around and charged the Indians the same as anybody else for using water. It was our understanding that we had the water to begin with, but by an act of Congress they took it away from us and turned it over to the Reclamation Service. I heard of cases like that, too, up in the Jocko district. Some of these men here today know more about that than I do and can explain it better than I can. I had a ditch of my own, too. Frank Gilkey helped me build it before the irrigation project was ever started; when they came in here and built the big ditch they wanted to cut me out of the water and I would not stand for it. They let me use the water for a while, but finally they cut me out and told me that if I wanted any water I would have to get it out of the big ditch and pay for it. A year after that the ditch rider

came out and I had some words with him. Finally he left the gate open, but they afterwards closed it and Mr. Moody promised that he would do what he could to see that I got water, but I have not got it yet. The irrigation project took all the ditches the Indians had and used their land for reservoir sites and they have not paid a cent for it, unless they have done it lately and I don't believe they have, and if the Indians wanted any water they had to pay for it the same as anyone else.

Under the treaty of 1855 the Flathead Tribe gave up the Bitter Root Valley and they were given all of the land on the Flathead Reservation to hold for all time for the use of the Flathead Tribe, and it was our understanding that that included the water rights. Later the Government came in and took the water away from us. We were not in favor of this project from the beginning, and protested against it, but they came in and put it in anyway, and they promised us at the time that the Indians would never be charged anything for the water; now we are taxed water rent, construction charges, and everything else. The charges are so high that enough cannot be produced on the land to pay them, and it has caused a great deal of dissatisfaction among the Indians, and many of them are in very poor circumstances, and have a hard time to get along, as many of them have lost their land. There are very few of the old long-haired Indians farming on the reservation. A few of the middle aged long-haired Indian are, but not many. Mr. Bullhead, there, is a man about 60. He is farming and is a very good farmer, too. I am not a full blood myself. I am a quarter breed.

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA, Appellant,

-vs-

B. W. ALEXANDER, BECKWITH MERCANTILE
COMPANY, a Montana Corporation, JOHN A. HAZEL,
THEODORE KNUTSON and EDNA I. KNUTSON, his
wife, P. W. SORENSON, AVERY A. STEVENS, MEIL
C. PIERCE, BERT LISH, BERT MYERS NELSON,
JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON,
JOHN MINESINGER and ADA B. MINESINGER, his
wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation,
and DENNIS A. DELLWO,

Appellants,

-vs-

B. W. ALEXANDER et al,

Appellees.

**Reply Brief of Appellants, Flathead
Irrigation District and Dennis A. Dellwo**

POPE & SMITH,
WALTER L. POPE,
RUSSELL E. SMITH,
Attorneys for said Appellants,
Flathead Irrigation District
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At the outset these appellants point out that appellees' brief makes no attempt to meet appellants' argument upon the question presented (our brief p. 16): "Do the defendants have any right to take their water regardless of amount, except as delivered by the Project Engineer?"

The complaint in intervention alleged (R. 68):

"That the defendants, and each of them, have taken the amounts of water taken by them without regard to the officers in charge of the Flathead Irrigation Project, and have assumed to take such water as they deemed proper at such times and at such places as they deemed proper."

This complaint prayed (R. 80):

"That it be adjudicated and decreed that the defendants have no right to take said waters apart from the deliveries made to them by the agents of the United States in charge of said Flathead Irrigation Project, and that the said defendants be restrained from taking any water to which they may be entitled except as the same is delivered to them by the agents of the United States in charge of the Flathead Irrigation District."

Our brief, page 15, pointed out the evidence, wholly uncontradicted, which showed the wasteful and injurious results of the acts of the defendants in helping themselves to water without reference to the Project Engineer, who was appointed by the Secretary of the Interior as water commissioner to distribute these waters. These appellants consider the correction of the intolerable conditions resulting from this unregulated and unmeasured use the most important relief sought by them as interveners. Upon this aspect of the case appellees say nothing.

Appellees content themselves with arguing (1) that the court below was without jurisdiction for want of essential

parties, and (2) that the rights of the appellees are to be calculated on the assumption that each irrigable acre of the land originally allotted to Indians, is entitled to a sufficient amount of water to properly irrigate it, before surplus unallotted lands are entitled to any water.

The question of jurisdiction has been covered in our original brief. But as to point (2), above, it should be pointed out, perhaps more fully than was done in our main brief, pp. 26-27, that even if the rights of appellees were as argued by them, still they have taken, and insist on taking, more water than they are entitled to.

As appears from lines 8 and 9 of Exhibit 19 (R. 401) if Indian allotments alone are to be supplied, the average amount of water which it would be possible to deliver would be 2.16 acre feet per acre. This figure includes the water saved or created by storage or pumping. As against this, the defendants on the McDonald-Deschamps ditch were helping themselves to 4.32 acre feet per acre, exactly twice as much, and those on the Magee-Minesinger ditch were taking 8.12 acre feet per acre.

The true disparity is even greater. For surely defendants can claim no share in stored and pumped water, for which they will pay or contribute nothing. (Appellees omit discussion of the question of the stored water). And if the stored water be not considered, the whole of the Indian allotments in the Mission Valley Division would have an average of only 1.34 acre feet per acre. (Exhibit 19, R. 401).

Thus in any event, on any theory of defendants' rights, and notwithstanding anything stated in appellees' brief, they have not only helped themselves to water, they have helped themselves to excessive quantities, and in this suit

claim their right to continue such use. Clearly they should be enjoined not only from helping themselves, but also from taking these excessive quantities.

The exact measure of defendants' rights becomes important only when the court comes to consider, not whether an injunction should issue, but the specific terms of the injunction. (See our brief, p. 27).

Upon this question appellees go far afield by arguing: (1) The waters were reserved by treaty to individual Indians, not to the tribe; (2) that therefore each allotted Indian (as well as these appellees as successors to Indians) acquired a vested right to sufficient water to irrigate his land.

It is submitted that the argument is a mere play on words, and does not touch the controlling question here. The rules governing these waters were stated by this court in *United States v. McIntire*, 101 F. (2d) 650, at p. 653, as follows:

“The waters of Mud Creek were impliedly reserved by the treaty to the Indians. *Winters v. United States*, 207 U. S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; *United States v. Powers*, 9 Cir., 94 F. 2d 783, 785, and cases cited. The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians. *Minnesota v. Hitchcock*, 185 U. S. 373, 387, 22 S. Ct. 650, 46 L. Ed. 954. Being reserved no title to the waters could be acquired by anyone except as specified by Congress.”

Appellees argue at great length that the words “reserved by the treaty to the Indians,” mean, to the individual Indians, not to the tribe. Such an argument solves nothing. It is clear that the word “Indians,” whether it refers to individuals or tribe, means “all the Indians.” That is what this suit is about. It is a suit designed to find out whether

these few appellees, almost entirely white purchasers from a few Indians, shall remain in a position to help themselves to quantities of water far in excess of that available to Indian owners and to other purchasers from Indian allottees, like the appellant Dellwo. We seek here to redress inequalities, and we do it, not in the name of any "tribe" as distinguished from "individual Indians." Dellwo is likewise a successor of an "individual Indian." As for him, he says that when this court used the words "reserved by the treaty to the Indians," it meant "all the Indians."

«After the lands and waters were reserved to the Indians as individuals, then when the United States accepted the trust for all of the individuals the right of each Indian as a beneficiary was necessarily limited and restricted by the correlative right of other individual Indians, and the United States in the discharge of its duties as trustee was necessarily obliged to take such action as would provide the greatest good for the greatest number.✎

One reading appellees' brief about "individual Indians" having "vested" rights by virtue of the treaty of 1855, might even assume that appellees were arguing that such treaty created in Duncan McDonald and Frank Fiddler and Edward Deschamps and their other predecessors specific rights to the waters of Post Creek. But of course neither McDonald nor Fiddler nor Deschamps, nor any of their predecessors, had any better right to those waters than all the other Indians of the tribe.

The Flathead people were not living upon the present reservation at the time of this treaty. They were living in the general area of the Bitter Root Valley in Montana. This is shown by the terms of the treaty itself. In Article 2 of the treaty the Indians agree to move to the reservation

within one year after the ratification of the treaty. The treaty further provided for the appraisal of the improvements of the Indians who, on moving, had to abandon the same. It also contains a provision for the payment of certain money to compensate the Indians for moving to the reserved land. The treaty of 1855 did not definitely fix the reservation at least so far as the Flatheads were concerned. Article II of the treaty provided that if upon a survey it should be decided that the Bitter Root Valley was better suited to the needs of the tribe than the general reservation then portions of the Bitter Root should be set aside as a reservation. The question was not settled until the proclamation of President Grant in 1871.

Northern Pac. R. Co. v. Maclay, 61 Fed. 554.

Northern Pac. R. Co. v. Hinchman, 53 Fed. 523.

Surely no one will argue that any particular one of these Indians, none of whom lived even near to the lands or stream in question, acquired, by the treaty, any greater rights than the other Indians of the tribe.

Nor do appellees enlighten the court by calling their rights "vested."

If one has a right of course it is vested. The question is, rather, what is that right? But the right of these appellees, as well as of "all the Indians" of the Reservation, was as stated in the language of this court quoted above. (101 F. 2d. 653):

"The United States became a trustee, holding the legal title to the land and waters for the benefit of the Indians."

This defines the rights of all the Indians. It defines the rights of Dellwo and of the hundreds of water users in his

position. It defines the rights of appellees. Their rights are to have this trust carried out. The question is was this trust breached?

Of course these few appellees, located on lands close to Post Creek, where water can be brought to them with a minimum of constructed works, would prefer to see the United States simply do nothing, thus allowing them to monopolize these waters. But the United States has intervened, and by the expenditure of over eight million dollars (R. 372), made water available not merely to those few allotments immediately adjacent to the streams, but to a very large number of allotted lands, which, like those of Dellwo, would have no opportunity to obtain water were it not for this government distribution system (R. 460). This was done so that "all the Indians" might be served, and in accordance with the policy of the greatest good for the greatest number.

Some of the benefits of this government project were therefore:

1. Water was made available for lands of "all the Indians," including those too remote from streams to build their own ditches. (R. 460).
2. The total supply in the irrigation season was augmented by 98,000 acre feet of stored water, (which was 38 percent of the whole supply, R. 229) (R. 392, 221) accumulated in reservoirs from winter and early spring run-off, which would otherwise be lost, and from pumping from sources which would otherwise be unavailable. (R. 390, 392, 219).
3. Water was rotated among users thus accomplishing

a saving in the use of waters impossible without the government controls (R. 406, 408).

4. The central control system made it possible (a) to ascertain from year to year what is a *pro rata* distribution, (R. 410) and (b) to make an orderly division of the waters. (R. 411, 462).

To bring the surplus unallotted lands likewise within the project was not a breach of trust by the United States. Not only were these lands thus made saleable at the Indian price, but, as pointed out in the Brief for the United States, (pp. 10, 11) the proceeds of their sale were first used for the construction of the system and later paid to the Indian tribe. Inclusion of these additional lands provided just that many more landowners to share in construction and operation costs. Indeed, the stored and pumped water alone may well be sufficient to supply these unallotted lands.

Surely this court cannot say that in constructing this system as it did, and including these surplus lands to provide additional contributors to the construction and operating costs, the United States brought about a result which, all things considered, deprived the Indians as a whole of that which they might otherwise have had. Indeed it may well have appeared to Congress at the time the system was set up, that a comprehensive system such as this would not prove feasible without including the unallotted lands. If it requires a mile of ditch to reach three Indian allotments, surely it is not unreasonable to include for service from the same ditch two unallotted units which are traversed within the same mile and which can thus contribute to the common cost.

The conclusion is that since the defendants were, regardless of all other considerations, helping themselves to excessive quantities of water, refusing to install measuring devices or to submit to any controls, the court below erred in refusing the injunction prayed for by intervenors. And if and when it becomes necessary for the court, in order to make its injunction specific, to define the rights of the parties, its conclusion should be that the government's system has been well calculated to benefit all of the beneficiaries of its trust, that such trust has not been betrayed by the inclusion of unallotted lands, and that defendants' rights must be determined accordingly.

Respectfully submitted,

POPE & SMITH,
WALTER L. POPE,
RUSSELL E. SMITH,

Missoula, Montana.

Attorneys for Appellants,
Dellwo and Flathead
Irrigation District.

**In the United States
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Appellees,

and

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and DENNIS A. DELLWO,

Appellants,

-vs-

B. W. ALEXANDER et al,

Appellees.

**Petition of Appellants, Flathead Irrigation
District and Dennis A. Dellwo
for Rehearing**

FILED

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PAUL F. O'BRIEN,
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POPE & SMITH,
WALTER L. POPE,
RUSSELL E. SMITH,
Attorneys for said Appellants,
Flathead Irrigation District
and Dennis A. Dellwo.

TO THE HONORABLE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT,
AND TO THE JUDGES THEREOF:

Come now Flathead Irrigation District, a corporation, and Dennis A. Dellwo, appellants above-named, and present this their Petition for Rehearing of the above entitled cause, and in support thereof respectfully show:

1. *The decision of the court has overlooked the fact that the findings and the evidence disclose that appellees are using water in excess of "so much water as may be required to irrigate such lands."*

In rejecting the government's claim, the opinion of the court states: (P. 4)

"Before it would be entitled to an injunction, it must show that appellees have wrongfully diverted water. No violation of the Act of April 23, 1904, as amended by the Act of May 29, 1908 is shown, since there is no claim that appellees used an amount of water in excess of 'so much water as may be required to irrigate such lands'."

It is respectfully submitted that the court has overlooked the fact that the lower court made findings, based on uncontradicted evidence, which disclose that the appellees are in fact using such excess quantities of water. The court made specific findings as to the amounts of water "required to irrigate such lands." By Finding 64 (R. 166) the court found that the lands of appellees under the McDonald-Deschamps ditch required two and one-half acre feet per acre per annum. By Finding 65 (R. 167) the court found that the lands of the appellees under the Magee-Minesinger ditch required two acre feet of water per acre

per annum. These findings were based upon testimony directed to that end. (R. 231).

By Finding 66 (R. 167) the court found the amounts of water used by appellees through the McDonald-Deschamps ditch for the years 1935 to 1938, inclusive. This showed for 1938 the use of 1490.32 acre feet of water. By Finding 67 (R. 167) the court found the amounts of water taken by the appellees through the Magee-Minesinger ditch for the years 1935-1938 inclusive. This showed a use by them in 1938 of 2558.16 acre feet of water. (R. 168)

The quantities last mentioned were taken by the court from the testimony of C. H. Dexter, pages 339-343 of the record, and these figures were arrived at by actual gauge readings. (R. 339)

Finding 63 (R. 165) contains the court's findings as to the irrigable acreage on the tracts involved, and from this it appears that the acreage of the appellees under the McDonald-Deschamps ditch was 525 acres, and that under the Magee-Minesinger ditch 317.6 acres.

Thus it appears that in the year 1938 the appellees under the Magee-Minesinger ditch, not confining themselves to the two acre feet per annum which the court found to be the amount required to produce crops to the full extent of the soil on such lands, actually used more than four times that amount, or 8.05 acre feet per acre. In the same year the appellees under the McDonald-Deschamps ditch, not confining themselves to the two and one-half acre feet per annum required to produce crops to the full extent of the soil on those lands, used 2.83 acre feet.

It thus plainly appears that even applying the standard

or test set up by the opinion of this court, excessive quantities were diverted. The opinion of the court has overlooked these facts.

2. *The decision of the court has overlooked and omitted consideration of the language of the Act of May 29, 1908 (35 Stat. 448) which expressly excludes appellees from its provisions.*

It is respectfully submitted that the court has overlooked the fact that the lands of the appellees are not lands irrigable under the Flathead Irrigation System, referred to and described in the Act of May 29, 1908 (35 Stat. 448). The lands of the appellees form no part of the Flathead Irrigation System. They are not subject to the payment of operation, maintenance or construction assessments to the United States either under the Act of May 29, 1908, or the Act of May 18, 1916 (39 Stat. 139). Nor do their lands form any part of an irrigation district organized to contract with the United States pursuant to the Act of May 11, 1926 (44 Stat. 464). The lands of the appellees are irrigated by ditches constructed by appellees or their predecessors.

The Act of May 29, 1908 was enacted for the purpose of outlining the methods and times of payment for water rights under the irrigation system for which the United States had begun making appropriations. See Act of April 30, 1908 (35 Stat. 83). And so the portion of the act upon which this part of the court's opinion places so much emphasis reads as follows:

“The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right,” etc. (Italics supplied).

The Act does not leave in doubt what is meant by “the systems herein provided.” The first reference to them is in the following words of the Act:

“That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act, shall,” etc.

Section fourteen, as amended by the same Act of May 29, 1908, provides:

“That the proceeds received from the sale of said lands *** shall be expended as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation;”

In other words, the “systems herein provided” are systems constructed by the United States. This is the Flathead Irrigation Project, as constructed by the government. Appellees’ lands are served by no such system.

Since the lands of the appellees are not lands “irrigable under the systems herein provided,” the appellees are not entitled to any water by virtue of that legislative enactment. They do not come within its terms.

If the rights of appellees are dependent upon the Act of May 29, 1908, appellees would be entitled to nothing.¹

3. *All the legislation referring to the Flathead Irrigation Project discloses that Congress intended all users thereunder to have equal rights.*

Several of the acts of Congress relating to the Flathead Irrigation Project are in part quoted in the appendix to

Footnote 1. It should not be understood that interveners claim that appellees have no rights. Their right to a pro rata share is conceded in our original brief. What we have here pointed out is the fallacy of basing their rights on the language quoted by the court from the Act of May 29, 1908.

these appellants' original brief. The Act of May 29, 1908 (35 Stat. 448) when read in its entirety furnishes a clear demonstration that all lands under the system were expected to have equal water rights. By this Act the entryman was "required to pay for a water right the proportionate cost of the construction of said system." The entryman of lands "to be irrigated by said system" was required to reclaim at least "one-half of the total irrigable area of his entry." The use of water on such lands was limited to tracts not exceeding 160 acres to any one person and "all applicants for water rights under the systems constructed in pursuance of this act" were required to pay annual charges for operation and maintenance, failing which the water right and the entry were subject to cancellation. When the payments required by the act had been made for the major part of the unallotted lands, the management and operation of the works would pass to the "owners of the lands irrigated thereby." The Act also provided for "the construction of irrigation systems, for the irrigation of *the irrigable lands embraced within the limits of said reservation.*" (Italics supplied).

It will thus be noted that the Act of May 29, 1908, clearly contemplated that the entryman who, under the Act, was a purchaser of unallotted lands, and who was required to pay the Indian price therefor, was to have a water right under the systems. The Act draws no distinction between the water rights for allotted and unallotted lands under the system, with the exception that the Indian allottee was not required to pay construction costs since tribal funds were

then being used for that purpose. (See Section 14 of the Act of April 23, 1904, as amended by the Act of May 29, 1908). It would be absurd to suppose that the water right in connection with which the purchaser of unallotted lands was required to reclaim half of his irrigable area would be anything other than a water right equivalent, so far as priority is concerned, to the water rights of every other user under the system.

The Act of May 18, 1916 (39 Stat. 139) went still further in undertaking to provide substantial equality among all water users. This legislation was adopted pursuant to the report contained in House Document No. 1215, 63rd. Congress, Third Session, House Documents Vol. 103, page 33, in consequence of which the tribal funds previously used for construction were restored to the tribe. This Act prescribed that "the allottee, entryman, purchaser or owner of such irrigable land" should pay the the United States construction charges in stated installments. The act provided that "such charges shall be assessed against the land irrigable by the systems on each said reservation in the proportion of the total construction costs which each acre of such land bears to the whole area of irrigable land thereunder." Certainly this language cannot be reconciled with an assumption of a congressional intention that the water rights under the systems be treated as unequal.

Again, the Act of May 11, 1926 (44 Stat. 464) calling for the creation of irrigation districts and repayment contracts, made it clear that all landowners were to be treated alike. Thus, ~~in speaking of~~ trust patent Indian lands,

which were to remain outside the districts until fee patent had been issued, were treated of in the following language:

“That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the *same rights and privileges and be subject to the same obligations as other lands within such district or districts.*” (Italics supplied).

All of the appropriation acts of Congress mention allotted and unallotted lands in the same breath. The Act of April 30, 1908 (35 Stat. 83), appropriated for the irrigation of the “allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted lands to be disposed of under the Act of April twenty-third, nineteen hundred and four.” For a list of similar acts see our original brief, page 40.

4. *The decision overlooks the rule that the United States, as owner of the Flathead Irrigation Project, and as trustee for the Indian and white users thereunder may enter the courts to protect its and their rights, and that the adoption of rules and regulations is not a prerequisite to the institution of such a suit.*

By the legislation in question Congress has provided for the construction of an irrigation system, title to which is in the United States. The United States, through the Department of the Interior, administers that system and divides and distributes the water. As owner and operator of the system the United States has found that the appellees have taken, and are taking, excessive quantities of water for which the lands irrigable under the systems have need. The claim of the government is that these appellees are not

only trespassers, but are continuing and repeated trespassers. The situation is therefore not different than that discussed by Judge Wolverton in his opinion in *United States v. Conrad Investment Co.*, 156 Fed. 124, which decision was affirmed by this court in 161 Fed. 829. Judge Wolverton, speaking at page 132, said:

“Another question presented is whether complainant can maintain this proceeding without at the same time making all other appropriators and users of water from the same stream parties to the suit, that the correlative rights of all of the parties to the use of such water may be settled and adjusted. I am of the opinion that it can. *Any invasion of the government's right to the use of the water from said stream would give it cause for suit, and this would be so whether the shortage to the government was caused by one or several parties.* All would be trespassers, and the government could sue some or all jointly, or any one of them severally, as it might feel disposed.” (Italics supplied).

See also *Vineyard Land & Stock Co. v. Twin Falls Oakley Land & Water Co.*, 245 Fed. 30, at page 35.

This is unquestionably a suit to enjoin trespassers. There is therefore no defect of parties defendant.

The right of the United States itself, as owner and operator of an irrigation system to enjoin threatened interferences and trespasses has always been taken for granted, and in fact has never been questioned. For an illustration of a suit of that kind see *Ide v. United States*, 263 U. S. 497, where the United States sued to enjoin interference with work which it was doing in connection with an irrigation project, and in which the government's rights to certain specific water had been drawn in question.

The assumption in the opinion of the court that the United States may not maintain this suit to establish its contentions that the appellees are in fact taking excessive quantities of water and are therefore trespassers, without first adopting rules and regulations, finds no support in the decisions of the Supreme Court of the United States. Thus in *Cotton v. United States*, 52 U. S. 229, 11 How. 229, the United States brought an action of trespass against Cotton, who was charged with cutting and carrying away certain timber from government lands. Cotton contended that the only remedy of the United States was by indictment, and that the United States had no common law remedy for private wrongs. The court said:

“It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, they were not entitled to the same remedies for their protection. The restraints of the constitution upon their sovereign powers cannot affect their civil rights. Although as a sovereign the United States may not be sued, yet as a corporation or body politic they may bring suits to enforce their contracts and protect their property, in the state courts, or in their own tribunals administering the same laws. As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have. As was said by this court in *Dugan v. United States*, 3 Wheat, 181: ‘It would be strange to deny them a right which is secured to every citizen of the United States’.”

The case just cited was quoted with approval by this court in *Merryweather v. United States*, 12 Fed. (2d) 407, at page 410. In accord see *In Re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. Ed. 1092, and *New York v. New Jersey*, 256 U. S. 296, 65 L. Ed. 937, 41 S. Ct. 492.

Neither in *Ide v. United States*, cited above, nor in any of the cases last cited was there intimation that the executive officers of the United States, or the United States Attorney, must secure the adoption of rules and regulations as a prerequisite to the institution of a suit to enjoin a trespass.

There is a further reason why the adoption of rules and regulations here is not a prerequisite to a determination of the government's claim. As pointed out above, Congress, in setting up the Flathead Irrigation Project and the systems comprehended therein, has established a system for equal water rights. As we have indicated, no distinction has been drawn between allotted and unallotted lands. It is difficult to understand how rules and regulations reciting the same principle of equality or directing a pro rata distribution would add anything to what Congress, as well as this court in the *McIntire* and *Powers* cases, have already prescribed.

And in instituting this suit the United States has obviously acted in a representative and trust capacity. It acts for itself as owner and administrator of the system, and for the land owners within it and served by it. If it were necessary to do so, we might here invoke the provisions of Rule 23 of the Federal Rules of Civil Procedure, but the principles applicable to such representative suits are too elementary to require that.

This being so, it is difficult to see how there can be a want of necessary parties. As for the users under the system, they are represented by the government. As for the appellees, they cannot object that other defendants should

be joined for the reasons stated by Judge Wolverton in the language we have quoted above. As we shall point out shortly, the defendants are trespassers and wrongdoers without regard to whether unallotted lands are or are not computed in determining how the water should be distributed. But surely the United States should be permitted not only to ask for an injunction, but to ask for an injunction the terms and extent of which will protect all users under the project systems. The question of how many of these users may be considered in defining the rights of the government is merely a question incidental to the securing of an injunction,—incidental because it relates to the extent and terms of the injunction.

5. *The decision overlooks the fact that the findings and evidence disclose that, wholly apart from a consideration of unallotted lands, and considering allotted lands only, defendants are using excessive quantities of water.*

As previously indicated, the government and the interveners might have contended that if the rights of the defendants must be sought in the provisions of the Act of May 29, 1908, then they have no rights and should be denied all water. The government and the interveners have taken the position that the defendants are entitled to not to exceed a pro rata share of the normal flow of the Flathead streams. (Clearly, they have no basis for any claim to any stored or pumped water developed with government funds not chargeable to or made reimbursable from the lands of the appellees and distributed and operated by a system to which appellees make no contribution for operation or maintenance.) The uncontradicted evidence in the record

discloses that the appellees have been taking quantities of water in excess of a pro rata share even if only allotted lands were taken into consideration. (See Ex. 19, R. 401).

The opinion of the court would seem to indicate that the court has overlooked this fact, for the court, in the last paragraph on page 4 of the opinion, seems to assume that an insufficiency of the water supply would not occur unless unallotted lands were considered in the total quantity entitled to water.

The lower court's Finding No. 100 (R. 185), which is quoted in the opinion, is not contrary to our assertion. By that finding the court found that "the natural flow of water is ** not sufficient to irrigate the irrigable area of all of the Indian allotments."

The lower court's Finding No. 98 (R. 185) is even more specific, the court there finding that "the amount of water available in acre feet per acre on the Mission Valley Division ** is not sufficient to produce crops to the full extent of the soil thereof if only Indian allotments ** are considered."

The finding in the last part of Finding No. 100 to the effect that the Indian allotments could be irrigated if stored water were used and added to the natural flow is beside the point, for the appellees in this case are not entitled to claim an interest in such stored waters, nor to have the same computed in determining the extent of their rights. It therefore plainly appears that the government has taken a sound and reasonable attitude toward the appellees in assuming their right to a pro rata participation in the waters naturally flowing in the reservation streams, yet such pro

rata participation would be the extreme limit of any right which the appellees might claim, and measured by that standard the appellees are shown to have exceeded such pro rata share, and whether unallotted lands be considered or not the government is clearly entitled to an injunction against them.

6. *The regulations promulgated by the Secretary, appointing the Project Manager a water master to distribute waters, and requiring headgates in ditches, is valid if authorized by any legislation.*

These regulations are referred to in a footnote to the opinion. They are apparently held ineffective because "they appear to be rules promulgated under the amendment of 1908 to Sec. 9."

The Act of May 29, 1908 authorized the making of rules and regulations. So did the Act of May 18, 1916. So did the General Allotment Act. And since all these acts are of equal dignity, it is believed the court has overlooked the principle, well stated in *Klutts v. Jones* (N. M.), 148 Pac. 494, that administrative action will be sustained if within any legislative authority.

The record shows at length the injurious effect of the refusal of appellees to conform to such regulations. (See our original brief, p. 15, for a review of this evidence.) To accord interveners the relief prayed in paragraph IV of their prayer (R. 80), which is based on these regulations, would involve no problem of additional parties, and it is believed this relief should have been recognized and granted.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be grant-

ed and that the judgment of the District Court be upon further consideration reversed.

Respectfully submitted,

POPE & SMITH

WALTER L. POPE

RUSSELL E. SMITH

Attorneys for said Appellants,
Flathead Irrigation District
and Dennis A. Dellwo.

CERTIFICATE OF COUNSEL

I, counsel for the above named appellants, Flathead Irrigation District and Dennis A. Dellwo, do hereby certify that in my judgment the foregoing Petition for Rehearing is well founded, and I further certify that said petition is not interposed for delay.

WALTER L. POPE,

Counsel for said Appellants.

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

H. F. METCALF, as Trustee in Bankruptcy of the
Estate of F. P. Newport Corporation, Ltd., a
corporation, Bankrupt,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

DEC 2 1942

PAUL F. O'BRIEN,
CLERK

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UNITED STATES OF AMERICA,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
Southern District of California

Central Division

In Bankruptcy No. 25,308-M

In the Matter of

F. P. NEWPORT CORPORATION, LTD.,
Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION IN
BANKRUPTCY

To the Honorable, the Judges of the Central Division of the United States District Court, for the Southern District of California:

The petition of C. G. Kinsey, W. B. Halligan, and Hiram E. Casey, as Trustee of the Estate of Charles R. Stuart, a bankrupt, respectfully shows and alleges:

I.

That at and during all of the times herein mentioned the F. P. Newport Corporation, Ltd. was and is a corporation, and has had its principal place of business at 106 West 6th Street in the City of Los Angeles, County of Los Angeles, State of California for the greater portion of the six months next preceding the filing of this petition, and owes debts in the amount of One Thousand (\$1,000.00) Dollars and over, and the same is a commercial corporation doing a realty business and is not a municipal, railroad, insurance or banking corporation or a building and loan association.

II.

That your petitioners are creditors of the said F. P. Newport Corporation, Ltd. having provable claims amounting in the aggregate in excess of securities held by them to the sum of Five Hundred (\$500.00) Dollars and more. That the nature and amounts of your petitioners' claims are as follows, to-wit:

(a) The claim of your petitioner C. G. Kinsey is a balance due for work and labor performed and services rendered to the [2] said Alleged Bankrupt at its special instance and request upon an open book account within four years last past in the sum of \$2,500.15 and accrued interest, which said sum the said Alleged Bankrupt promised and agreed to pay therefor, and that neither the whole nor any part of the said sum has been paid, and the whole thereof, is now due, owing and unpaid from the said Alleged Bankrupt to the said C. G. Kinsey;

(b) The claim of your petitioner W. B. Halligan is a balance due for work and labor performed and services rendered to the said Alleged Bankrupt at its special instance and request upon an open book account within four years last past in the sum of \$613.32 and accrued interest, which said sum the said Alleged Bankrupt promised and agreed to pay therefor, and that neither the whole nor any part of the said sum has been paid, and the whole thereof is now due, owing and unpaid from the said Alleged Bankrupt to the said W. B. Halligan;

(c) The claim of your petitioner Hiram E. Casey as Trustee in Bankruptcy for Charles R. Stuart, bankrupt, is based upon a judgment procured by the said Hiram E. Casey as trustee of the said Charles R. Stuart, Bankrupt, in the sum of \$766.97, which said sum was procured in a Municipal Court in the City of Los Angeles, County of Los Angeles, State of California, on the 12th day of June, 1934, in an action therein numbered 346125 wherein your said petitioner was the plaintiff and the said Alleged Bankrupt herein was the defendant; that no part of the said sum has been paid, and the whole thereof remains due, owing and unpaid.

III.

That the said Alleged Bankrupt, F. P. Newport Corporation, Ltd. is insolvent, and that within four months next preceding the date of this petition and while insolvent the said F. P. Newport Corporation, Ltd. committed an act of bankruptcy in this, that it did heretofore on or about the 15th day of March, 1935, [3] transfer a portion of its property, to-wit, money in the sum of \$433.20 to a certain general unsecured creditor, to-wit, J. B. Gribble, with intent to prefer the said creditor over its other creditors in the same class, the payment of which said sum, as aforesaid, did then and there amount to a preference in favor of the said creditor.

Wherefore, your petitioner prays that service of this petition with the subpoena be made upon the said F. P. Newport Corporation, Ltd. as provided

by the Acts of Congress relating to Bankruptcy, and that it may be adjudged by the Court to be a Bankrupt within the purview of the said Act.

C. G. KINSEY

W. B. HALLIGAN

HIRAM E. CASEY

Hiram E. Casey as Trustee of
the Estate of Charles R.
Stuart, Bankrupt.

HIRAM E. CASEY,

Attorney for Petitioning Creditors. [4]

State of California

United States of America

Southern District of California

Central Division

County of Los Angeles—ss:

C. G. Kinsey, W. B. Halligan and Hiram E. Casey, as Trustee of the Estate of Charles R. Stuart, a bankrupt, being the three petitioning creditors herein, each being duly sworn, does hereby make solemn oath that the statements contained in the foregoing petition subscribed by them are true.

C. G. KINSEY

W. B. HALLIGAN

HIRAM E. CASEY

Hiram E. Casey, as Trustee
of the Estate of Charles R.
Stuart, Bankrupt.

Subscribed and sworn to before me this 18th day of March, 1935.

(Seal) GLADYS M. NICKELL

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 19, 1935, 10:50 AM. R. S. Zimmerman, Clerk. By Theodore Hocke, Deputy Clerk. [5]

[Title of District Court and Cause.]

ADJUDICATION AND ORDER OF
REFERENCE

At Los Angeles, in said District, on the 12th day of January, A. D., 1937, before the Honorable Wm. P. James, Judge of said Court in bankruptcy, the petition of C. G. Kinsey, W. B. Halligan and Hiram E. Casey, as Trustee of the Estate of Charles R. Stuart, a bankrupt, that F. P. Newport Corporation, Ltd., a corporation, be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said F. P. Newport Corporation, Ltd., a corporation, is hereby declared and adjudged a bankrupt accordingly.

It Is Therefore Ordered, That said matter be referred to E. R. Utley, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said F. P. Newport Corporation, Ltd. shall

attend before said Referee on the 19th day of January, at Los Angeles and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said involuntary bankruptcy.

Witness, the Honorable Wm. P. James, Judge of the said Court, and the seal thereof, at Los Angeles, in said District, on the 12th day of January, A. D. 1937.

(Seal of the

Court) R. S. ZIMMERMAN

Clerk

By M. R. WINCHELL,

Deputy Clerk.

[Endorsed]: Filed Jan. 12, 1937. [6]

[Title of District Court and Cause.]

ORDER ALLOWING REVIEW FROM REFEREE'S ORDER APPOINTING TRUSTEE HEREIN, AND, ORDER APPOINTING H. F. METCALF, TRUSTEE.

The Petition for Review by Hiram E. Casey, Esq., Trustee in Bankruptcy of the Estate of Charles R. Stuart, Bankrupt, of the Order made and entered herein on February 25, 1937, by Hon. Ernest R. Utley, Referee in Bankruptcy, appointing Hubert F. Laugharn as Trustee in Bankruptcy herein, came on regularly for hearing before the Court on the 15th day of March, 1937, at 10:00 o'clock A. M., the said Hiram E. Casey, Esq., appearing in per-

son, and Bank of America National Trust & Savings Association appearing by its attorney, Edmund Nelson, Esq., and Robert Powell, Esq., appearing on behalf of certain creditors herein, and the said Petition having been presented upon the verified Petition of said Hiram E. Casey, Esq., and the Certificate of the Referee herein, together with an Amendment thereto, together with the Reporter's Transcript of the proceedings had before the Referee herein on February 23, 1937, and on February 25, 1937, and the matter having been argued and presented by the respective counsel herein and submitted to the Court for its decision, and the Court having considered said Petition for Review and Certificate of said Referee and Amendment thereto and the Transcript of the proceedings had before said Referee as filed herein by said Referee, and being fully advised in the premises; and

It Appearing to the Court that the meeting of creditors for the election of a Trustee herein was duly and regularly called for and held on the 23rd day of February, 1937, at 10:00 o'clock A. M. [7] before Hon. Ernest R. Utley, one of the Referee's herein, and that at the said time and place H. F. Metcalf was the only nominee for the office of Trustee and that the said H. F. Metcalf received the majority in number and amount of votes then and there voting:

It Further Appearing that there was not a good or sufficient cause shown for continuing the meeting for the election of Trustee from February 23,

1937, to February 25, 1937; and that there was an abuse of discretion by the said Referee in ordering the said election of the said Trustee to be continued from the 23rd day of February, 1937, at 10:00 o'clock A. M. to the 25th day of February, 1937, at 10:00 o'clock A. M. and that said H. F. Metcalf was duly and regularly elected Trustee herein on the said 23rd day of February, 1937; now therefore, It Is Hereby Ordered:

1. That the Order heretofore on February 25, 1937, made and entered herein by Ernest R. Utley, Referee herein, appointing Hubert F. Laugharn Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt, be and it is hereby disaffirmed and set aside.

2. That H. F. Metcalf be and he is hereby declared to be the duly elected Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt.

3. That the bond of H. F. Metcalf as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, bankrupt, be and it is hereby fixed at the sum of \$10,000.00, said bond to be approved by the Referee in Bankruptcy before said Trustee takes office herein.

Dated this 18th day of March, 1937.

PAUL J. McCORMICK,

United States District Judge.

[8]

[Endorsed]: Filed Mar. 18, 1937. R. S. Zimmerman, Clerk. [9]

“Original”

In the District Court of the United States for the
Southern District of California.

No. 25,308-M

In Bankruptcy

In the matter of F. P. Newport Corporation,
Limited, Los Angeles, California.

CLAIM OF UNITED STATES FOR TAXES

State of California,

County of Los Angeles—ss.

Nat Rogan, Collector of Internal Revenue for
the Sixth Collection District of California, a duly
authorized agent for the United States in this
behalf, being duly sworn, deposes and says:

1. That the above-named, is justly and truly
indebted to the United States in the sum of
\$19,363.65, with interest thereon as hereinafter
stated; and,

2. That the nature of the said debt is internal
revenue taxes due pursuant to law as follows:

Nature of Tax	Year or Taxable Period Ended	Amount of Tax	Interest
Income	1938	\$14,365.96	As provided by law
Income	1939	4,997.69	“ “ “ “

Total Principal, Only \$19,363.65

(For the information of the Referee and the
Trustee, attention is directed to the fact that while
this claim is filed in the proceeding in order that
the parties interested shall have notice of the tax

liability, nevertheless this is a tax incurred during the course of the administration of the bankrupt estate, and is not to be considered as an ordinary tax claim.)

*Note: The Collector of Internal Revenue should be notified before payment of this claim is made in order that advice may be given as to the amount of statutory interest due. (Telephone: Madison 7411, Station 731.)

3. That no part of said debt has been paid, but that the same is now due and payable at the office of the Collector of Internal Revenue at Los Angeles, Cal.

4. That there are no set-offs or counterclaims to said debt.

5. That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens.

6. That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon.

7. That said debt has priority, and must be paid in full in advance of distributions to creditors, as and to the extent provided in Section 64 or Section 659 of the Bankruptcy Act, Section 3466 of the

Revised Statutes, or other applicable provisions of law. Attention is also called to the provisions of Section 3467 of the Revised Statutes, with respect to the personal liability of every executor, administrator, assignee or other person who fails to pay the claims of the United States in accordance with their priority.

Dated this 19th day of July, 1940.

Collector of Internal Revenue for the Sixth District of California.

NAT ROGAN.

Subscribed and sworn to before me this 19th day of July, 1940.

(Seal) T. G. ALBRIGHT,
Notary Public.

My commission expires October 22, 1940.

[Endorsed]: Filed July 22, 1940. Ernest R. Utley,
Referee.

Filed Nov. 28, 1941. R. S. Zimmerman, Clerk.

[10]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIM OF UNITED
STATES FILED THROUGH COLLECTOR
OF INTERNAL REVENUE FOR \$19,363.65.

Comes now H. F. Metcalf, the duly appointed,
qualified and acting Trustee in Bankruptcy in the

above entitled matter, and objects to the allowance of the claim of the United States filed by Nat Rogan, Collector of Internal Revenue for the Sixth Collection District of California, in the sum of \$19,363.65, on or about July 22, 1940, and as grounds of objection thereto alleges:

I.

That the undersigned, said H. F. Metcalf, as said Trustee in Bankruptcy, is not, nor is the estate of the above named bankrupt, indebted to the United States in the sum of \$19,363.65 or in any other sum or amount whatsoever, either as alleged in said claim or otherwise or at all.

II.

That heretofore and on the 12th day of January, 1937, F. P. Newport Corporation, Ltd. was duly adjudicated a bankrupt, and that thereafter and on the 18th day of March, 1937, the undersigned, H. F. Metcalf, was duly appointed Trustee in Bankruptcy of the above named bankrupt corporation, ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of said estate; that ever since said time said Trustee in Bankruptcy has been engaged in preserving and conserving the assets of said estate pending the sale thereof; that a portion of such assets has been liquidated and sold; that said Trustee in Bankruptcy has not since his appointment and qualification, [11] as hereinbefore alleged, been conduct-

ing or operating the business or properties of such bankrupt estate, and has not, either in the year 1938 or 1939 or at any other time or at all, as such Trustee in Bankruptcy, received any income which is subject, under the laws of the United States, to an income tax.

III.

That the purported assessment or purported claim of the United States for \$19,363.65 alleged income tax is without authority in law and is wholly devoid of merit.

IV.

That the undersigned Trustee in Bankruptcy herein has heretofore complied with all requirements of the Treasury Department of the United States and has filed each year on the proper tax forms a statement of his receipts and disbursements, claiming that his receipts were wholly exempt from income tax under the laws of the United States; that heretofore and on or about August 9, 1940, he filed a written protest to the assessment of the alleged deficiency tax in said sum of \$19,363.65, and thereafter an oral hearing in relation thereto was had with a conferee of the Internal Revenue Agent in Charge of the Los Angeles Division.

Wherefore, the Trustee prays that a time and place be fixed for the hearing of these objections; that due notice thereof be given to the claimant, and that upon the hearing of these objections said

claim be disallowed; and for such other and further relief as may be proper in the premises.

H. F. METCALF,

As Trustee in Bankruptcy
herein.

BAILIE, TURNER & LAKE,

By ALLEN T. LYNCH,

Attorneys for Trustee.

(Verified.)

[Endorsed]: Filed Sep. 27, 1940. Ernest R. Utley,
Referee. Filed Nov. 28, 1941, R. S. Zimmerman,
Clerk. [12]

[Title of District Court and Cause.]

ORDER DISALLOWING CLAIM OF COLLEC-
TOR OF INTERNAL REVENUE.

Be It Remembered:

That heretofore and on or about the 22nd day of July, 1940, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and as the duly authorized agent for the United States of America in that behalf, filed with this Court and in the above entitled proceeding, his claim for \$19,363.65, as and for alleged income taxes asserted to be due and payable by H. F. Metcalf, as Trustee in Bankruptcy of the above entitled bankrupt estate, for the years 1938 and 1939; that thereafter and on the 27th day of September, 1940,

said H. F. Metcalf, as such Trustee in Bankruptcy, duly filed his objections to the allowance of said claim, and the hearing thereon was duly set by this Court for the 18th day of October, 1940, and written notice of the hearing thereof was duly given to claimant; that thereafter the hearing of said matter was from time to time continued until the 31st day of December, 1940, at which time said matter came on regularly for hearing before this Court at the hour of 10:00 o'clock A. M., Eugene Harpole, Esq., Special Attorney for the Bureau of Internal Revenue, appearing as counsel for claimant, and Messrs. Bailie, Turner & Lake, by Allen T. Lynch, appearing as counsel for the Trustee in Bankruptcy; whereupon said matter was submitted for the decision of this Court upon a written stipulation of facts made and entered into by and between said claimant and said Trustee in Bankruptcy and filed with this Court; and the [13] Court having considered such stipulation of facts so filed and the memorandums of points and authorities filed on behalf of the respective parties and being fully advised in the premises, finds and concludes:

1. That neither said Trustee in Bankruptcy nor said bankrupt estate is indebted to the United States of America or said Collector of Internal Revenue in the sum of \$19,363.65, or in any other sum or amount whatever, either as alleged in said claim on file herein or otherwise or at all.

2. That the acts and transactions had and performed by the Trustee in Bankruptcy and referred to in said stipulation of facts were had, done, and

performed by said Trustee in Bankruptcy in compliance with and in the performance of his duties as such Trustee in Bankruptcy.

3. That said Trustee in Bankruptcy, in so performing said acts and in entering into and carrying out said transactions hereinbefore and in said stipulation of facts referred to, was not operating the property or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52 (a) of the Internal Revenue Code of the United States of America, and therefore was not required to make any return or pay any income tax upon the monies received by him as such Trustee in Bankruptcy during the calender years of 1938 and 1939 or either of them.

It Is Therefore Ordered, Adjudged and Decreed that the objections filed by the Trustee in Bankruptcy to said claim hereinbefore referred to be and they are hereby sustained on each and every ground in said objections set forth, and that said claim so filed by said Collector of Internal Revenue in behalf of the United States of America for alleged income taxes in the sum of \$19,363.65 be and it is hereby disallowed.

Dated this 17th day of March, 1941.

ERNEST R. UTLEY,

Referee in Bankruptcy. [14]

[Endorsed]: Filed Mar. 17, 1941. Ernest R. Utley, Referee. Filed Nov. 28, 1941. R. S. Zimmerman, Clerk. [15]

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME WITH-
IN WHICH TO FILE AN APPLICATION
FOR REVIEW OF THE ORDER OF THE
REFEREE.

Comes now United States of America and Nat Rogan, its Collector of Internal Revenue for the Sixth Collection District of California, by and through its attorneys, Wm. Fleet Palmer, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District, and Eugene Harpole, Special Attorney for the Bureau of Internal Revenue, and moves the Court that the time within which said Claimant may make application to the United States District Court for the Southern District of California for the review of the Order of the Referee in Bankruptcy herein dated March 14, 1941, and disallowing the claim for income taxes of the United States of America and said Nat Rogan, its Collector of Internal Revenue, be extended to and including the 23rd day of April, 1941.

Dated this 22nd day of March, 1941.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant U. S. Attorney.

EUGENE HARPOLE,
Special Attorney.
Bureau of Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Claimant.

It Is So Ordered this 22nd day of March, 1941.

ERNEST R. UTLEY,

Referee in Bankruptcy.

[Endorsed]: Filed Mar. 22, 1941. Ernest R. Utley,
Referee. [17]

CERTIFICATE OF TRUE COPY

United States of America,
Southern District of California,
Central Division—ss.

I, Ernest R. Utley, Referee in Bankruptcy in and for the County of Los Angeles, State of California, in and for the said district, do hereby certify that the foregoing is a true and correct copy of Motion for Extension of Time Within Which to File an Application for Review of the Order of the Referee and the Order Thereon in the above entitled matter as the same appears of record in the proceedings in said matter now on file in my office.

In Witness Whereof, I have hereunto set my hand this 29th day of April, 1942.

ERNEST R. UTLEY,

Referee in Bankruptcy.

[Endorsed]: Filed Apr. 29, 1942. R. S. Zimmerman, Clerk. [18]

In the District Court of the United States
in and for the Southern District of California
Central Division

In Bankruptcy No. 25,308-M

In the Matter of

F. P. NEWPORT CORPORATION, LTD.,
a corporation,

Bankrupt.

PETITION FOR REVIEW OF REFEREE'S ORDER

Comes now the United States of America, by and through its attorneys, and files this, its Petition for Review of that certain Order made and entered in the above entitled proceeding on the 17th day of March, 1941, which reads as follows, to-wit:

[Note: "Order Disallowing Claim of Collector of Internal Revenue" is here omitted pursuant to designation. Said order is set forth at page 15 of this printed record.] [19]

In this Petition for Review the United States of America alleges that the Referee in Bankruptcy erred in his said Order of March 17, 1941, in the following respects:

I.

That the Referee in Bankruptcy erred in disallowing the claim filed on July 22, 1940, by Nat Rogan as Collector of Internal Revenue for the Sixth Collection District of California on behalf of

the United States of America for Federal income taxes for the taxable years 1938 and 1939 in the sum of \$19,363.65 for the reason that said taxes were lawfully due to the United States upon the net income realized by the bankrupt estate from the operation of its property or business during said years.

II.

That the Referee in Bankruptcy erred in failing and refusing to hold that the Trustee in Bankruptcy was, during the taxable years 1938 and 1939, operating the property or business of F. P. Newport Corporation, Ltd., the bankrupt, within the meaning of Section 52(a) of the Revenue Act of 1939 and the Internal Revenue Code and Section 19.52-2 of Treasury Regulations 103. [22]

III.

That the Referee in Bankruptcy erred in holding that the net income of \$87,066.42 and \$30,288.99 determined by the Commissioner of Internal Revenue to have been received by said bankrupt's estate and its Trustee in Bankruptcy during the calendar years 1938 and 1939, respectively, was not subject to Federal income tax within the meaning of Section 52(a) of the Revenue Act of 1938 and of the Internal Revenue Code.

IV.

That the Referee in Bankruptcy erred in failing to allow the claim filed July 22, 1940, on behalf of

the United States of America for 1938 and 1939 income taxes in the sum of \$19,363.65.

Wherefore, your petitioner prays that said Order be reversed and that said claim for 1938 and 1939 income taxes be allowed as filed and the Trustee in Bankruptcy directed to pay the same in the sum of \$19,363.65, together with interest as provided by law, forthwith.

Dated: April 22, 1941.

WM. FLEET PALMER, E. H.,

United States Attorney

E. H. MITCHELL, E.H.,

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney,

Bureau of Internal Revenue,

Attorneys for Claimant.

[Endorsed]: Filed Apr. 22, 1941. Ernest R. Utle, Referee. Filed Nov. 28, 1941. R. S. Zimmerman, Clerk. [23]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW.

To the Honorable Paul J. McCormick, Judge of the
United States District Court in and for the
Southern District of California, Central Division:

I, Ernest R. Utle, Referee in Bankruptcy, to whom the proceedings in this matter were referred, do hereby certify:

That, on January 12, 1937, F. P. Newport Corporation, Ltd., a corporation, was duly adjudicated a bankrupt, and proceedings in relation to said bankrupt estate were duly referred to this Referee. That on March 18, 1937, H. F. Metcalf was duly appointed Trustee in Bankruptcy of said bankrupt estate, duly qualified as such, and ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of said estate, and as such has been since March 18, 1937, in possession and control of all of the properties and assets of said bankrupt corporation.

That on July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, duly filed a claim in the above entitled bankruptcy proceedings in behalf of the United States of America for the sum of \$19,363.65, asserting thereby that there was due and owing the United States of America from and by said H. F. Metcalf, as such Trustee in Bankruptcy, said sum of \$19,363.65, as income tax determined and assessed by the Commissioner of Internal Revenue for the taxable years 1938 and 1939, the original of said claim being hereto attached [25] and made a part hereof.

Thereafter and on September 28, 1940, said H. F. Metcalf, as such Trustee in Bankruptcy, duly filed an objection to the allowance of said claim, which objection briefly stated was to the effect that the determination and assessment of said tax was wholly without authority and void in law, as said

Trustee in Bankruptcy was not during said taxable years, or either of them, operating the property or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52a, Title 26 of the Internal Revenue Code, and that by reason thereof his receipts as such Trustee in Bankruptcy during said years were not subject to the imposition of an income tax. The original of said objections of said Trustee in Bankruptcy to said claim is attached hereto and made a part hereof.

That thereafter and on the 30th day of December, 1940, a Stipulation of Facts was made and entered into by and between counsel representing said claimant and counsel representing said Trustee in Bankruptcy, the original of which is attached hereto and made a part hereof.

That thereafter briefs were submitted in behalf of the respective parties and the matter was taken under consideration by your Referee and on the 17th day of March, 1941, your Referee made and signed an order disallowing said claim so filed in behalf of the United States. The original of said order is attached hereto and made a part hereof.

That said order so signed and made by your Referee adjudicated and determined that said H. F. Metcalf, as such Trustee in Bankruptcy, was not indebted to the United States of America or said Collector of Internal Revenue in the said sum of \$19,363.65 or any other sum or amount whatsoever, and that the acts and transactions had and performed by the Trustee in Bankruptcy were had,

done and performed by said Trustee in Bankruptcy in compliance with and in performance of his duty as such Trustee in Bankruptcy, and that in so [26] acting he was not operating the property or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52a of Title 26 of the Internal Revenue Code, and that therefore said Trustee in Bankruptcy was not required to make any return or pay any income tax upon the moneys received by him as such Trustee in Bankruptcy during the calendar years of 1938 and 1939, or either of them.

That the determination of your Referee of the issues involved was had after a full consideration of all of the facts referred to in said Stipulation of Facts hereinbefore mentioned, and from and after a careful consideration thereof your Referee concluded that the moneys so received by said Trustee in Bankruptcy were not taxable under the provisions of said taxing statute, as the Trustee in Bankruptcy was performing only the duties required of him under the Bankruptcy Act and was not operating the business or properties of the bankrupt corporation.

Your Referee is not summarizing the evidence herein, because the facts upon which your Referee's decision are based are set forth in the Stipulation of Facts hereinbefore mentioned and the exhibits thereto attached and therein referred to.

Your Referee submits herewith the following:

1. Claim filed by Nat Rogan, in behalf of the United States of America, for \$19,363.65.

2. Objections filed by the Trustee in Bankruptcy to said claim.
3. Order disallowing said claim.
4. Petition of United States of America for Review of said Order.
5. Stipulation of Facts made and entered into by and between counsel representing claimant and said Trustee in Bankruptcy. [27]
6. Petition for authorization, approval and confirmation of an oil and gas lease, and for order to show cause filed with the Referee on January 14, 1938.
7. The First, Second, Supplement to Second, and Third Reports filed with your Referee by said Trustee in Bankruptcy on March 29, 1938, December 8, 1938, December 22, 1938, and October 31, 1939, respectively.
8. Briefs filed with your Referee by the parties.

Dated this 27 day of June, 1941.

Respectfully submitted,

ERNEST R. UTLEY

Referee in Bankruptcy.

[Endorsed]: Filed Jun. 27, 1941. R. S. Zimmerman, Clerk. [28]

[Title of District Court and Cause.]

Upon consideration of the referee's certificate on review and the referee's order disallowing claim of

the Collector of Internal Revenue, and upon the entire record of proceedings in the above entitled matter, it appears that subsequent to the hearing and submission of the petition for review herein, the Ninth Circuit Court of Appeals in *Perry v. Baumann*, decided September 4, 1941, has established a rule that has not been complied with in this matter. Now, therefore, the entire proceeding upon the claim of the Collector of Internal Revenue and objections to the allowance of said claim by the trustee in bankruptcy and all records certified and transmitted to the judge in this review are returned to the referee in bankruptcy with instructions for further proceedings and, specifically, for the preparation, making and entry of findings of fact, conclusions of law, and judgment or order, in conformity with the aforesaid decision of the Ninth Circuit Court of Appeals.

Dated October 23, 1941.

PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed Oct. 23, 1941. R. S. Zimmerman, Clerk. [30]

[Title of District, Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER DISALLOWING CLAIM OF
COLLECTOR OF INTERNAL REVENUE,
AND ORDER VACATING AND SETTING
ASIDE PRIOR ORDER DISALLOWING
CLAIM OF COLLECTOR OF INTERNAL
REVENUE.

Be It Remembered:

That heretofore and on or about the 22nd day of July, 1940, Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and as the duly authorized agent for the United States of America in that behalf, filed with this Court and in the above entitled proceeding, his claim for \$19,363.65, as and for alleged income taxes asserted to be due and payable by H. F. Metcalf, as Trustee in Bankruptcy of the above entitled bankrupt estate, for the years 1938 and 1939; that thereafter and on the 27th day of September, 1940, said H. F. Metcalf, as such Trustee in Bankruptcy, duly filed in writing his objections to the allowance of said claim, and the hearing thereon was duly set by this Court for the 18th day of October, 1940, and written notice of the hearing thereof was duly given to claimant; that thereafter the hearing of said matter was from time to time continued until the 31st day of December, 1940, at which time said matter came on regularly for hearing before this Court, Ernest R. Utley, Referee in Bankruptcy, at

the hour of 10:00 o'clock A. M., Eugene Harpole, Esq., Special Attorney for the Bureau of Internal Revenue, appearing as counsel for claimant, and Messrs. Bailie, Turner & Lake appearing as counsel for the Trustee in Bankruptcy; whereupon said matter was submitted for the decision of this Court upon a written stipulation of facts made and entered into by and [31] between said claimant and said Trustee in Bankruptcy and on file with this Court; this Court, having considered such stipulation of facts so filed and the memorandum of points and authorities filed in behalf of the respective parties, and being fully advised in the premises, made and signed its order dated the 17th day of March, 1941, entitled Order Disallowing Claim of Collector of Internal Revenue; thereafter a petition to review said order was filed by and in behalf of said Collector of Internal Revenue, and the proceedings therein were duly certified and transmitted to the Honorable Paul J. McCormick, Judge of the above entitled court; that thereafter a hearing was had upon said review before the said Honorable Paul J. McCormick, as such judge, and on the 23rd day of October, 1941, the said Honorable Paul J. McCormick, as such judge, made and entered his order returning to this Court all records so certified and transmitted to him on said review, with instructions for this Court to take such further proceedings therein as might be necessary, and specifically for the preparation, making and entry of findings of fact, conclusions of law, and judgment or order

in conformity with the decision of the Ninth Circuit Court of Appeals in *Perry v. Baumann*, decided September 4, 1941;

Now, Therefore, in compliance with said order,
It Is Ordered:

That said order entitled Order Disallowing Claim of Collector of Internal Revenue, dated March 17, 1941, and hereinbefore referred to, be and it is hereby vacated and set aside, and in place and in lieu thereof this Court adopts, makes and signs the following findings of fact, conclusions of law and order. [32]

FINDINGS OF FACT.

The Court finds that:

1. The Commissioner of Internal Revenue determined deficiencies of \$14,365.96 and \$4,997.69 in the bankrupt's Federal income tax for the calendar years 1938 and 1939, respectively. Notice of the Commissioner's determination was sent to "F. P. Newport Corporation, Ltd., H. F. Metcalf, Trustee in Bankruptcy, 216 Central Building, 108 West Sixth Street, Los Angeles, California" by registered mail on July 13, 1940. On July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, filed a claim in the above entitled bankruptcy proceeding on behalf of the United States for the sum of \$19,363.65, representing the amount of alleged deficiencies in income tax so determined by the Com-

missioner of Internal Revenue for the taxable years 1938 and 1939. On September 28, 1940, the Trustee in Bankruptcy filed an objection in writing to the allowance of said claim.

2. The bankrupt, F. P. Newport Corporation, Ltd., was organized under the laws of the State of Delaware on December 2, 1929, and it afterward qualified to do business in the State of California. It was engaged in the real estate business in the State of California prior to March 19, 1935. In the conduct of said business it purchased large tracts of unimproved lands, subdivided portions of them into city lots, installed the essential public improvements and then endeavored to sell the lots, and did sell a great many of them. It also acted as a selling agent for many parcels of real property owned by other persons. It conducted its business for the purpose of making a profit.

3. On March 19, 1935, an involuntary petition in bankruptcy was filed against F. P. Newport Corporation, Ltd., in the United States District Court for the Southern District of California, Central Division, in case numbered 25,308-M, Bankruptcy. A receiver was thereupon appointed by the Court. All of the assets and affairs [33] of F. P. Newport Corporation, Ltd. were placed in the possession and control of said receiver. The receivership continued until January 12, 1937, when the corporation was adjudicated a bankrupt. H. F. Metcalf was appointed Trustee in Bankruptcy on March 18, 1937, and at all times since has been in possession and

control of all the property and assets of the bankrupt.

4. The properties and assets received from the bankrupt by said Trustee in Bankruptcy consisted of numerous parcels of real estate, both improved and unimproved, and other assets consisting of accounts, promissory notes, bills receivable and other tangible and intangible property.

5. At the date of bankruptcy record legal title to approximately ninety per cent of the real properties received by the Trustee in Bankruptcy stood in the name of the Security-First National Bank of Los Angeles, in trust, as security for an indebtedness owing said bank by said F. P. Newport Corporation, Ltd., as evidenced by a written declaration of trust numbered D-7224, formerly numbered SS-70401, signed by the bank, approved by the bankrupt, on March 1, 1930. At the date of filing the petition in bankruptcy said indebtedness exceeded \$1,300,000.00. Said bank filed a claim in the bankruptcy proceeding as an unsecured creditor in the amount of \$500,000.00, after crediting what it determined to be the value of the security held by it upon the indebtedness of F. P. Newport Corporation, Ltd. Claims filed against the bankrupt estate other than the claim of said bank exceed in all the sum of \$295,000.00, none of which have been paid by the Trustee in Bankruptcy, either in whole or in part.

6. For the purpose of avoiding a forced sale of said real properties and with the object of obtaining

time within which to liquidate the properties at a fair value, a contract was made and entered into by and between Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., the bankrupt, and the [34] Trustee in Bankruptcy with the approval of this Court. A copy of said agreement, with the supplements thereto and modifications thereof, is attached to said stipulation of facts, marked Exhibit "A", and is by reference made a part hereof, as fully and completely as though here copied and set forth at length.

7. Among the real properties title to which is so held by said bank under said declaration of trust are two parcels—one of three and the other of six acres, separated by an intervening three-acre parcel belonging to third persons. Both parcels are situated adjacent to what is known as Channel No. 3 of Long Beach Harbor in the City of Long Beach, California. During the pendency of the bankruptcy proceeding producing oil and gas wells were drilled and other wells were being drilled or about to be drilled on nearby lands which adjoined and surrounded said two parcels. It was feared by the Trustee and said Security-First National Bank of Los Angeles that the operation of these wells would drain away the oil and gas believed by the Trustee to underlie the same. The Trustee in Bankruptcy did not have sufficient funds to enable him to drill any oil or gas wells. By and with the approval of this Court, he leased the said two parcels of land to Universal Consolidated Oil Company, a copy of

which lease is attached to the Trustee's Petition for Authorization, Approval and Confirmation of an Oil and Gas Lease, and for Order to Show Cause, filed with the Court on January 14, 1938, reference to which is hereby made for further particulars, and the same is made a part hereof by said reference as fully and completely as though here copied and set forth at length. Other lots in the same general area which were not of sufficient size to be covered by separate leases, were included in a community oil and gas lease wherein the Bankline Oil Company was the lessee.

01 [8. Oil and gas royalties including bonuses actually paid to the Trustee under the terms and provisions of said leases during the year 1938 amounted to \$245,517.65 and during the year 1939 amounted [35] to \$206,333.36. These moneys were paid to the bank by the Trustee upon orders of this Court to cover taxes assessed against the properties, record legal title to which was so held by the bank as security for the indebtedness owing it, costs of engineering services for checking oil and gas production on the property leased to Universal Consolidated Oil Company, and to apply on account of the interest and principal owing on the secured debt of the said bank.

XX 9. From the sales of real estate made during 1938 the Trustee received \$5,600.00 and during 1939 \$18,650.00 from the same source. Eighty per cent of the moneys so obtained were paid to the bank by the Trustee upon order of the Court to apply on

18,650
5,600
13,050

account of the principal and interest owing said bank on its said secured debt. Twenty per cent of said receipts were retained by the Trustee and used by him in payment of expenses of administration.

10. The Trustee in Bankruptcy has endeavored at all times since his appointment to sell various properties of the bankrupt at prices commensurate with their value. Due to depressed market conditions, sales have been slow. The indebtedness of the estate is considerable and the Trustee has believed it to be to the best interest of the creditors not to sacrifice the properties by an immediate sale under the aforesaid conditions and, accordingly, has conducted a selling program which would enable him to spread his sales over a period of time and take advantage of favorable market conditions. All sales made by said Trustee were duly approved by order of Court. Pending sale, some of the unsubdivided properties, (other than the properties covered by the oil leases hereinbefore mentioned), have been rented by the Trustee mainly for agricultural purposes.

11. It was necessary for the Trustee from time to time to make repairs upon certain of the properties and to make or have made certain improvements on some properties to preserve them from hazards of fire and flood pending a sale thereof.

[36]

12. The Trustee in Bankruptcy has participated in all of the transactions set forth in his First, Second, Supplemental Second and Third Reports

and Accounts filed on March 29, 1938, December 8, 1938, December 22, 1938, and October 31, 1939, respectively. He has not engaged in the purchase or subdivision of real property nor acted as a selling agent for owners of property.

13. No general order of the Court authorizing the Trustee to conduct the business of the bankrupt corporation or forbidding him to do so has ever been made or signed. The Court has made orders authorizing the Trustee to lease, pending sale thereof, unsubdivided lands, grant easements and rights of way to the City of Los Angeles and County of Los Angeles for street purposes, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, enter into agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the Universal Consolidated Oil Company lease hereinbefore mentioned pending determination of title disputes to the property covered by the lease, renew contracts with the Oil Field Testing and Engineering Company, Inc. for the checking of oil and gas production on said property, and to lease, pending sale, a barn belonging to the bankrupt estate for the storage of hay.

14. The Trustee in Bankruptcy has kept books of account and filed with the Collector of Internal Revenue a statement of his receipts and disbursements for the years 1938 and 1939, with the nota-

tion that there had been and was no taxable income for said years or either of them. The Internal Revenue Agent thereafter examined the Trustee's books and the Commissioner of Internal Revenue made his assessments, represented by his alleged claim on file herein upon figures compiled by said Agent from the Trustee's records as follows: [37]

1938

RECEIPTS

By sales of real estate approved by Court.....	\$ 5,500.00	✓
Interest on bankrupt's accounts.....	203.80	
Rents collected from miscellaneous properties.....	4,557.98	
Ranch rentals	1,792.50	
Collected on bankrupt's old accounts.....	2,007.00	
Cash bonus (Universal Consolidated Oil Co. lease)	25,000.00	
Oil bonus (Universal Consolidated lease).....	25,000.00	
Oil and gas royalties.....	195,517.65	
	<hr/>	
	\$259,578.93	

DEDUCTIONS ALLOWED BY COMMISSIONER

Bankrupt's costs on real estate sold.....	\$ 4,470.60	—
Commissions to brokers on sales.....	275.00	
Trustee's branch office expenses.....	407.34	
Verdugo tract upkeep expenses.....	126.53	
Other properties upkeep expenses.....	729.71	
Ranch upkeep expenses.....	191.30	
Title expenses Re: Sales made.....	74.10	
Interest paid Security-First National Bank.....	50,773.40	
Taxes paid on properties.....	21,705.76	
Trustee's office rent.....	1,440.00	
Telephone and telegraph.....	394.50	
Office supplies and expenses.....	885.58	
Salaries of Trustee's assistants.....	5,145.01	
Miscellaneous expenses including Trustee's bond	262.99	

Other expenses (Loss of assets through fore-closure)	1,735.56
Depreciation on office fixtures and equipment	614.52
Depletion (oil)	67,517.35
Expense of checking oil and gas production on properties leased to Universal.....	1,920.73
Bankruptcy fees allowed by Court.....	13,842.53

[38]

Total\$172,512.51

Commissioner's Determination of Net

Income\$ 87,066.42

1939

RECEIPTS

By sales of real estate approved by Court.....	\$ 19,450.00
Interest on contracts for sales of real estate..	17.53
Rents from miscellaneous properties.....	4,650.76
Ranch rentals	2,038.75
Other receipts by sales from miscellaneous personal properties	81.00

Oil and gas royalties..... 206,333.36

Total\$232,571.40

DEDUCTIONS ALLOWED BY COMMISSIONER

Cost of real estate sold.....	\$ 30,770.40
Commissions to brokers on sales.....	1,256.50
Trustee's branch office expenses.....	1,418.98
Verdugo tract upkeep expenses.....	178.82
Ranch upkeep expenses.....	235.46
Other property upkeep expenses.....	1,462.30
Title expenses Re: sales made.....	424.70
Interest paid to Security-First National Bank	46,892.48
Taxes on properties.....	37,304.67
Trustee's office rent.....	320.00
Telephone and telegraph.....	334.06
Office supplies and expenses.....	1,173.81

Salaries to Trustee's assistants.....	4,727.53
Miscellaneous expenses including Trustee's bond	130.29
Expenses of checking production under Uni- versal Consolidated oil lease.....	3,982.50
Depreciation on office fixtures and equipment	621.50
Depletion (oil)	56,741.67
	[39]
Bankruptcy fees allowed by Court.....	14,306.82
Total	<hr/> \$202,282.41 <hr/>
Commissioner's determination of net income	\$ 30,288.99

CONCLUSIONS OF LAW

From the foregoing findings of fact, this Court concludes as a matter of law:

1. That said Trustee in Bankruptcy, H. F. Metcalf, in performing the acts and entering into and carrying out the transactions as hereinbefore found by this Court, was not operating the property or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52 (a) of the Internal Revenue Code of the United States of America, and therefore was not required to make any return or pay any income tax upon the moneys received by him as such Trustee in Bankruptcy during the said calendar years of 1938 and 1939 or either of them.

2. That the acts and transactions had and performed by the Trustee in Bankruptcy, as hereinbefore found by this Court, were had, done and

performed by said Trustee in Bankruptcy in compliance with the provisions of the Acts of Congress of the United States of America relating to bankruptcy, and in performance of his duties as such Trustee in Bankruptcy, as provided and set forth in said Acts relating to bankruptcy.

3. That neither said Trustee in Bankruptcy nor said bankrupt estate is indebted to the United States of America or said Collector of Internal Revenue, as alleged and set forth in said claim so filed by the Collector of Internal Revenue, either in the sum of \$19,363.65 or in any other sum or amount whatever.

4. That the objections filed by the Trustee in Bankruptcy to said claim of the Collector of Internal Revenue should be sustained upon each and every ground in said objections set forth and said claim [40] disallowed.

Let an order be made accordingly.

Order

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the objections filed by the said Trustee in Bankruptcy herein, H. F. Metcalf, to the claim hereinbefore filed in these proceedings by Nat Rogan, as Collector of Internal Revenue for the Sixth Collection District of California, and as the duly authorized agent for the United States of America in that behalf, for \$19,363.65, as and for alleged income taxes asserted to be due and payable

by said Trustee in Bankruptcy for the years 1938 and 1939, be and they are hereby sustained on each and every ground in said objections set forth, and the said claim so filed by said Collector of Internal Revenue for the sum of \$19,363.65 be and it is hereby disallowed.

Dated this 12th day of November, 1941.

ERNEST R. UTLEY,

Referee in Bankruptcy.

Approved as to form pursuant to Rule 44:

WM. FLEET PALMER,

United States Attorney.

E. H. MITCHELL,

Asst. United States Attorney.

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

By EUGENE HARPOLE,

Attorneys for United States of
America and Nat Rogan, Col-
lector of Internal Revenue.

[Endorsed]: Filed Nov. 12, 1941. Ernest R. Utley,
Referee. Filed Nov. 28, 1941. R. S. Zimmerman,
Clerk. [41]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER

Comes now The United States of America, by and through its attorneys, and files this, its Petition for Review of that certain Order made and entered in the above entitled proceeding on the 12th day of November, 1941, which reads as follows, to-wit:

[Note: "Findings of fact, conclusions of law and order disallowing claim of collector of internal revenue, and order vacating and setting aside prior order disallowing claim of collector of internal revenue" are here omitted pursuant to designation. Said Findings, etc. are set forth at page 28 of this printed record.]

[43]

In this Petition for Review the United States of America alleges that the Referee in Bankruptcy erred in his said Order of November 12, 1941, in the following respects:

I.

That the Referee in Bankruptcy erred in disallowing the claim filed on July 22, 1940, by Nat Rogan as Collector of Internal Revenue for the Sixth Collection District of California on behalf of the United States of America for Federal income taxes for the taxable years 1938 and 1939 in the sum of \$19,363.65 for the reason that said taxes were lawfully due to the United States upon the

net income realized by the bankrupt estate from the operation of its property or business during said years.

II.

That the Referee in Bankruptcy erred in failing and refusing to hold that the Trustee in Bankruptcy was, during the taxable years 1938 and 1939, operating the property or business of F. P. Newport Corporation, Ltd., the bankrupt, within the meaning of Section 52 (a) of the Revenue Act of 1939 and the Internal Revenue Code and Section 19.52-2 of Treasury Regulations 103.

III.

That the Referee in Bankruptcy erred in holding that the net income of \$87,066.42 and \$30,288.99 determined by the Commissioner of Internal Revenue to have been received by said bankrupt's estate and its Trustee in Bankruptcy during the calendar years 1938 and 1939, respectively, was not subject to Federal income tax within the meaning of Section 52(a) of the Revenue Act of 1938 and of the Internal Revenue Code. [57]

IV.

That the Referee in Bankruptcy erred in failing to allow the claim filed July 22, 1940, on behalf of the United States of America for 1938 and 1939 income taxes in the sum of \$19,363.65.

Wherefore, your petitioner prays that said Order be reversed and that said claim for 1938 and 1939

income taxes be allowed as filed and the Trustee in Bankruptcy directed to pay the same in the sum of \$19,363.65, together with interest as provided by law, forthwith.

Dated: November 18, 1941.

WM. FLEET PALMER, E. H.

United States Attorney.

E. H. MITCHELL, E. H.

Asst. U. S. Attorney.

EUGENE HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

Attorneys for Claimant.

[Endorsed]: Filed Nov. 22, 1941. Ernest R. Utley, Referee. Filed Nov. 28, 1941. R. S. Zimmerman, Clerk. [58]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable Paul J. McCormick, Judge of the United States District Court in and for the Southern District of California, Central Division:

I, Ernest R. Utley, Referee in Bankruptcy, to whom the proceedings in this matter were referred, do hereby certify:

That on January 12, 1937, F. P. Newport Corporation, Ltd., a corporation, was duly adjudicated

a bankrupt, and proceedings in relation to said bankrupt estate were duly referred to this Referee. That on March 18, 1937, H. F. Metcalf was duly appointed Trustee in Bankruptcy of said bankrupt estate, duly qualified as such, and ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of said estate, and as such has been since March 18, 1937, in possession and control of all of the properties and assets of said bankrupt corporation.

That on July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of [60] California, duly filed a claim in the above entitled bankruptcy proceedings in behalf of the United States of America for the sum of \$19,363.65, asserting thereby that there was due and owing the United States of America from and by said H. F. Metcalf, as such Trustee in Bankruptcy, said sum of \$19,363.65, as income tax determined and assessed by the Commissioner of Internal Revenue for the taxable years 1938 and 1939. The original of said claim accompanies this certificate.

Thereafter and on September 28, 1940, said H. F. Metcalf, as such Trustee in Bankruptcy, duly filed his objections to the allowance of said claim, which objections, briefly stated, were to the effect that the determination and assessment of said tax was wholly without authority and void in law, as said Trustee in Bankruptcy was not during said taxable years, or either of them, operating the property

or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52a, Title 26 of the Internal Revenue Code of the United States, and that by reason thereof his receipts as such Trustee in Bankruptcy during said years were not subject to the imposition of an income tax. The original of said objections of said Trustee in Bankruptcy to said claim is attached hereto.

That thereafter and on the 30th day of December, 1940, a Stipulation of Facts was made and entered into by and between counsel representing said claimant and counsel representing said Trustee in Bankruptcy. The original of said Stipulation of Facts is attached hereto.

That thereafter briefs were submitted in behalf of the respective parties and the matter was taken under consideration by your Referee and on the 17th day of March, 1941, your Referee made and signed an order disallowing said claim so filed in behalf of the United States. The original of said order is attached hereto. [61]

That said order so signed and made by your Referee adjudicated and determined that said H. F. Metcalf, as such Trustee in Bankruptcy, was not indebted to the United States of America or said Collector of Internal Revenue in the said sum of \$19,363.65 or any other sum or amount whatsoever, and that the acts and transactions had and performed by the Trustee in Bankruptcy were had, done and performed by said Trustee in Bankruptcy

in compliance with and in performance of his duty as such Trustee in Bankruptcy, and that in so acting he was not operating the property or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52a of Title 26 of the Internal Revenue Code of the United States, and that therefore said Trustee in Bankruptcy was not required to make any return or pay any income tax upon the moneys received by him as such Trustee in Bankruptcy during the calendar years of 1938 and 1939, or either of them.

Thereafter and within the time allowed by law the United States of America filed its petition for review of the said order hereinbefore mentioned, and on or about the 27th day of June, 1941, the undersigned Referee filed or caused to be filed his certificate on review; thereafter and on October 23, 1941, the Court made its order directing that the entire record on said review be returned to the undersigned Referee, with instructions by the Court that the Referee make and prepare findings of fact, conclusions of law, and judgment or order, in conformity with the decision of the Ninth Circuit Court of Appeals in the case of *Perry v. Baumann*, decided September 4, 1941.

Thereafter and in conformity with said order, the Referee duly made, signed and filed his order setting aside and vacating the order of March 17, 1941, and made, signed and filed findings of fact, conclusions of law and order in lieu and in place of the order so vacated. Said findings of fact, con-

clusions of law, and order disallowing claim of the Collector of Internal Revenue and order [62] vacating and setting aside prior order disallowing claim of Collector of Internal Revenue are attached to this certificate, hereby referred to and made a part hereof.

Briefly summarized, the Referee concluded from the facts, found by the Referee as set forth in the attached findings of fact, that the Trustee in Bankruptcy was not during the period referred to therein operating the property or business of the bankrupt corporation within the meaning of the terms and provisions of Section 52a of Title 26 of the Internal Revenue Code of the United States, and therefore was not required to pay any tax upon the moneys received by him as such Trustee in Bankruptcy; that the acts and transactions had and performed by said Trustee as found by the Referee were done and performed by the Trustee in compliance with the provisions of the Acts of Congress of the United States of America relating to bankruptcy; that the objections filed by the Trustee in Bankruptcy to the claim of the United States of America filed through its Collector of Internal Revenue for the sum of \$19,363.65 should be sustained and the said claim disallowed, and in accordance therewith the Referee made his order sustaining said objections and disallowing said claim.

The Referee is not summarizing the evidence herein, since the evidence is contained and set forth

in the Stipulation of Facts hereinbefore mentioned and the exhibits thereto attached and therein referred to, all of which accompany this certificate.

That the United States of America has duly filed its petition for review of the Referee's findings of fact, conclusions of law and order hereinbefore mentioned, and dated the 12th day of November, 1941. The original of said petition accompanies this certificate.

The Referee submits herewith the following:

1. Claim filed by Nat Rogan, in behalf of the United States of America, for \$19,363.65.

[63]

2. Objections filed by the Trustee in Bankruptcy to said claim.

3. Order of March 17, 1941, disallowing said claim.

4. Stipulation of Facts made and entered into by and between counsel representing claimant and said Trustee in Bankruptcy.

5. Findings of fact, conclusions of law, and order disallowing claim of Collector of Internal Revenue, and order vacating and setting aside prior order disallowing claim of Collector of Internal Revenue.

6. Petition for authorization, approval and confirmation of an oil and gas lease, and for order to show cause, filed with the Referee on January 14, 1938.

7. The First, Second, Supplement to Second, and Third Reports filed with the Referee by

said Trustee in Bankruptcy on March 29, 1938, December 8, 1938, December 22, 1938, and October 31, 1939, respectively.

8. Petition of the United States of America for review of Referee's order, dated November 12, 1941.

9. Briefs or memorandums of points and authorities filed with the Referee for and on behalf of the parties to this matter.

Dated this 28th day of November, 1941.

Respectfully submitted,

ERNEST R. UTLEY,

Referee in Bankruptcy.

[Endorsed]: Filed Nov. 28, 1941. R. S. Zimmerman, Clerk. [64]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between H. F. Metcalf, as Trustee in Bankruptcy of the above named bankrupt corporation, and the United States of America and Nat Rogan, its Collector of Internal Revenue, through their undersigned counsel, respectively, that for the purpose of ruling upon the objections of the Trustee in Bankruptcy hereto filed to the claim for income taxes presented on behalf of the United States of America by Nat Rogan, Collector of Internal Revenue, for the sum of \$19,363.65 for the taxable years

1938 and 1939, the following facts may be taken as true:

I.

The Commissioner of Internal Revenue determined deficiencies of \$14,365.96 and \$4,997.69 in the bankrupt's Federal income tax for the calendar years 1938 and 1939, respectively. Notice of the Commissioner's determination was sent to "F. P. Newport Corporation, Ltd., H. F. Metcalf, Trustee in Bankruptcy, 216 Central Building, 108 West Sixth Street, Los Angeles, California" by registered mail on July 13, 1940. On July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, filed a claim in the above entitled bankruptcy proceeding on [66] behalf of the United States for the sum of \$19,363.65, representing the amount of alleged deficiencies in income tax so determined by the Commissioner of Internal Revenue for the taxable years 1938 and 1939. On September 28, 1940, the Trustee in Bankruptcy filed an objection to the allowance of said claim.

II.

The bankrupt, F. P. Newport Corporation, Ltd., was organized under the laws of the State of Delaware on December 2, 1929, and it afterward qualified to do business in the State of California. It was engaged in the real estate business in the State of California prior to March 19, 1935. In the conduct of said business it purchased large tracts of

unimproved lands, subdivided portions of them into city lots, installed the essential public improvements and then endeavored to sell the lots, and did sell a great many of them. It also acted as a selling agent for many parcels of real property owned by other persons. It conducted its business for the purpose of making a profit.

III.

On March 19, 1935, an involuntary petition in bankruptcy was filed against F. P. Newport Corporation, Ltd., in the United States District Court for the Southern District of California, Central Division, in case numbered 25,308-M, Bankruptcy. A receiver was thereupon appointed by the Court. All of the assets and affairs of F. P. Newport Corporation, Ltd. were placed in the possession and control of said receiver. The receivership continued until January 12, 1937, when the corporation was adjudicated a bankrupt. H. F. Metcalf was appointed Trustee in Bankruptcy on March 18, 1937, and at all times since has been in possession and control of all the property and assets of the bankrupt. [67]

IV.

The properties and assets received from the bankrupt by its Trustee consisted of numerous parcels of real estate, both improved and unimproved, and other assets consisting of accounts, promissory notes, bills receivable and other tangible and intangible property.

V.

At the date of bankruptcy record legal title to approximately ninety per cent of the real properties received by the Trustee in Bankruptcy stood in the name of the Security-First National Bank of Los Angeles, in trust, as security for an indebtedness owing said bank by said F. P. Newport Corporation, Ltd., as evidenced by a written declaration of trust numbered D-7224, formerly numbered SS-70401, signed by the bank, approved by the bankrupt, on March 1, 1930. At the date of filing the petition in bankruptcy said indebtedness exceeded \$1,300,000.00. Said bank filed a claim in the bankruptcy proceeding as an unsecured creditor in the amount of \$500,000.00, after crediting what it determined to be the value of the security held by it upon the indebtedness of F. P. Newport Corporation, Ltd. Claims filed against the bankrupt estate other than the claim of said bank exceed in all the sum of \$295,000.00, none of which have been paid by the Trustee in Bankruptcy, either in whole or in part.

VI.

For the purpose of avoiding a forced sale of said real properties and with the object of obtaining time within which to liquidate the properties at a fair value, a contract was made and entered into by and between Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., the bankrupt, and the Trustee in Bankruptcy with the ap-

proval of this Court. A copy of said agreement, [68] with the supplements thereto and modifications thereof is hereby attached, marked Exhibit "A" and by reference made a part hereof.

VII.

Among the real properties title to which is so held by said bank under said Declaration of Trust are two parcels—one of three and the other of six acres, separated by an intervening three-acre parcel belonging to third persons. Both parcels are situated adjacent to what is known as Channel No. 3 of Long Beach Harbor in the City of Long Beach, California. During the pendency of the bankruptcy proceeding producing oil and gas wells were drilled and other wells were being drilled or about to be drilled on nearby lands which adjoined and surrounded said two parcels. It was feared by the Trustee and said Security-First National Bank that the operation of these wells would drain away the oil and gas believed by the trustee to underlie the same. The Trustee in Bankruptcy did not have sufficient funds to enable him to drill any oil or gas wells. By and with the approval of the Court, he leased the said two parcels of land to Universal Consolidated Oil Company, a copy of which lease is attached to the Trustee's Petition for Authorization, Approval and Confirmation of an Oil and Gas Lease, and for Order to Show Cause, filed with the Court on January 14, 1938, reference to which is hereby made for further particulars, and the same is made part

hereof by said reference. Other lots in the same general area which were not of sufficient size to be covered by separate leases, were included in a community oil and gas lease wherein the Bankline Oil Company was the lessee.

VIII.

Oil and gas royalties, including bonuses actually paid to the Trustee under said leases during the year 1938 amounted to \$245,517.65 and during the year 1939 amounted to \$206,333.36. These [69] moneys were paid to the bank by the Trustee upon orders of Court to cover taxes assessed against the properties, costs of engineering services and checking oil and gas production and to apply on account to the interest and principal owing the said bank by the bankrupt.

IX.

From the sales of real estate made during 1938 the Trustee received \$5,500.00 and during 1939 \$18,650.00 from the same source. Eighty per cent of the moneys so obtained were paid to the bank by the Trustee upon order of the Court to apply on account of the principal and interest owing said bank. Twenty per cent of said receipts were retained by the Trustee and used by him in payment of expenses of administration.

X.

The Trustee in Bankruptcy has endeavored at all times since his appointment to sell various prop-

erties of the bankrupt at prices commensurate with their value. Due to depressed market conditions, sales have been slow. The indebtedness of the estate is considerable and the Trustee has believed it to be to the best interest of the creditors not to sacrifice the properties by an immediate sale under the aforesaid conditions and, accordingly, has conducted a selling program which would enable him to spread his sales over a period of time and take advantage of favorable market conditions. All sales made by said Trustee were duly approved by order of Court. Pending sale, some of the properties (other than the properties covered by the oil leases hereinbefore mentioned) have been rented by the Trustee mainly for agricultural purposes.

XI.

It was necessary for the Trustee from time to time to make repairs upon certain of the properties and to make or have made certain [70] improvements on some properties to preserve them from hazards of fire and flood.

XII.

The Trustee in Bankruptcy has participated in all of the transactions set forth in his First, Second, Supplemental Second and Third Reports and Accounts filed on March 29, 1938, December 8, 1938, December 22, 1938, and October 31, 1939, respectively. He has not engaged in the purchase or subdivision of real property nor acted as a selling agent for owners of property.

XIII.

No general order of the Court authorizing the Trustee to conduct the business of the bankrupt corporation or forbidding him to do so has ever been made or signed. The Court has made orders authorizing the Trustee to make leases of agricultural lands, grant easements, rights of way for streets, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, to enter agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the Universal Consolidated Oil Company lease hereinbefore mentioned pending determination of title disputes, to renew contracts with the Oil Field Testing and Engineering Company, Inc. and to lease a barn belonging to the bankrupt estate for the storage of hay.

XIV.

The Trustee in Bankruptcy has kept books of account and filed with the Collector of Internal Revenue a statement of his receipts and disbursements for the years 1938 and 1939, with the notation that there had been and was no taxable income for said years or [71] either of them. The Internal Revenue Agent thereafter examined the Trustee's books and the Commissioner of Internal Revenue made his assessments, represented by his alleged claim on file herein upon figures compiled by said Agent from the Trustee's records as follows:

1938

RECEIPTS

By sales of real estate approved by Court.....	\$ 5,500.00
Interest on bankrupt's accounts.....	203.80
Rents collected from miscellaneous properties	4,557.98
Ranch rentals	1,792.50
Collected on bankrupt's old accounts.....	2,007.00
Cash bonus (Universal Consolidated Oil Co. lease)	25,000.00
Oil bonus (Universal Consolidated lease).....	25,000.00
Oil and gas royalties.....	195,517.65
Total	\$259,578.93

DEDUCTIONS ALLOWED BY COMMISSIONER

Bankrupt's costs on real estate sold.....	\$ 4,470.60
Commissions to brokers on sales.....	275.00
Trustee's branch office expenses.....	407.34
Verdugo tract upkeep expenses.....	126.53
Other properties upkeep expenses.....	729.71
Ranch upkeep expenses.....	191.30
Title expenses Re: Sales made.....	74.10
Interest paid Security-First National Bank.....	50,773.40
Taxes paid on properties.....	21,705.76
Trustee's office rent.....	1,440.00
Telephone and telegraph.....	394.50
Office supplies and expenses.....	885.58
Salaries of Trustee's assistants.....	5,145.01
Miscellaneous expenses including Trustee's bond	262.99
Other expenses (Loss of assets through foreclosure)	1,735.56
	[72]
Depreciation on office fixtures and equipment	614.52
Depletion (oil)	67,517.35
Expense of checking oil and gas production on properties leased to Universal.....	1,920.73

Bankruptcy fees allowed by Court.....	13,842.53
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Total	<u>\$172,512.51</u>
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Commissioner's Determination of Net

Income	\$ 87,066.42
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1939

RECEIPTS

By sales of real estate approved by Court.....	\$ 19,450.00
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Interest on contracts for sales of real estate..	17.53
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Rents from miscellaneous properties.....	4,650.76
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Ranch rentals	2,038.75
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Other receipts by sales from miscellaneous personal properties	81.00
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Oil and gas royalties.....	<u>206,333.36</u>
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Total	<u>\$232,571.40</u>
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DEDUCTIONS ALLOWED BY COMMISSIONER

Cost of real estate sold.....	\$ 30,770.40
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Commissions to brokers on sales.....	1,256.50
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Trustee's branch office expenses.....	1,418.98
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Verdugo tract upkeep expenses.....	178.82
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Ranch upkeep expenses.....	235.46
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Other property upkeep expenses.....	1,462.30
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Title expenses Re: sales made.....	424.70
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Interest paid to Security-First National Bank	46,892.48
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Taxes on properties.....	37,304.67
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Trustee's office rent.....	320.00
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Telephone and telegraph.....	334.06
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Office supplies and expenses.....	1,173.81
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[73]

Salaries to Trustee's assistants.....	4,727.53
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Miscellaneous expenses including Trustee's bond	130.29
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Expenses of checking production under Uni- versal Consolidated oil lease.....	3,982.50
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Depreciation on office fixtures and equipment	621.50
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Depletion (oil)	<u>56,741.67</u>
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Bankruptcy fees allowed by Court..... 14,306.82

Total\$202,282.41

Commissioner's determination of net
income\$ 30,288.99

Dated: This 30th day of December, 1940.

WM. FLEET PALMER—E. H.

United States Attorney

E. H. MITCHELL—E. H.

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney,

Bureau of Internal Revenue.

Attorneys for United States

of America and Nat Rogan,

Collector of Internal Revenue.

BAILIE, TURNER & LAKE

By ALLEN T. LYNCH

Attorneys for H. F. Metcalf,

Trustee in Bankruptcy of F.

P. Newport Corporation, Ltd.,

Bankrupt.

Approved:

H. F. METCALF

Trustee.

Dec. 27, 1940. [74]

EXHIBIT "A"

AGREEMENT

This Agreement, made and entered into this 12th day of January, 1937, by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bankrupt, H. F. Metcalf, as Receiver for F. P. Newport Corporation, Ltd., an alleged Bankrupt, hereinafter called the Receiver, and Security-First National Bank of Los Angeles, a National Banking Association, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bank,

Witnesseth:

Recitals:

The Bankrupt is indebted to the Bank for money loaned to the Bankrupt, or advanced for its use, under the terms of the Trust Declaration, hereinafter referred to, and for costs and expenses incurred by the Bank in connection therewith, in the following sums, to wit:

1. Unpaid principal, evidenced by promissory notes executed by the Bankrupt to the Bank \$1,013,928.78
2. Interest on said notes up to February 1, 1937 219,887.25
3. Trust advances for benefit of the Trust Estate, under the terms of said Trust..... 105,365.93
4. Interest on said Trust advances to February 1, 1937..... 9,871.75

5. Necessary costs and expenses incurred by the Trustee in connection with the preservation of the Bank's security for its indebtedness	2,402.67
6. Interest thereon to February 1, 1937.....	273.00
Total.....	<hr/> \$1,351,729.38

All of said indebtedness is secured by the property conveyed by the Bankrupt to the Bank, as Trustee, in Trust with power of sale, to secure the same, and by a Pledge by the Bankrupt of the entire beneficial interest in and [75] to the said Trust. Said Trust is evidenced by a written Declaration of Trust No. D 7224, formerly numbered as SS 70401, signed by the Bank under date of March 1, 1930, and approved on said date by the Bankrupt. Reference is hereby made to said Declaration of Trust for the full terms and conditions thereof.

All of said indebtedness is long overdue, and no interest on said indebtedness has been paid by the Bankrupt for several years and all taxes and assessments on the Trust properties have been advanced by the Bank for several years.

An involuntary Petition to have the Bankrupt adjudicated a Bankrupt, has been pending since the month of March, 1935. Said Petition is at issue, but is still undecided.

Upon the filing of said involuntary Petition in Bankruptcy, to wit: on or about the 27th day of March, 1935, the Bankruptcy Court before which said Petition was pending, issued its Order restraining and enjoining the Bank from foreclosing

its said security for said indebtedness. Said restraining order is now, and ever since said date has remained in full force and effect.

On or about the 27th day of March, 1935, the Court appointed the above named Receiver, H. F. Metcalf, as Receiver in Bankruptcy, for properties of the Bankrupt, and he thereupon duly qualified and ever since said date has been, and now is, acting as such Receiver.

The Bankrupt and the Receiver are desirous of further postponing the foreclosure by the Bank of said security, for nonpayment of said indebtedness, and are desirous of starting the immediate liquidation of said indebtedness of the Bank, by the sale of certain of the real properties held by the Bank in said above referred to Trust. [76]

The Bank is willing to delay further the foreclosure of the said security and will agree to the immediate sale of certain of the assets in said Trust on the terms, and subject to the conditions herein-after contained, and not otherwise, hence this Agreement.

The Agreement.

Order of Court Allowing Receiver to Execute Required.

The Receiver agrees to petition the Bankruptcy Court forthwith for leave to execute this agreement. Should the Court refuse to grant leave to the Receiver to so execute this agreement, and thereafter the Receiver fail to execute it, the Bank, at its

election, shall have the right to cancel this agreement.

Adjudication of Bankruptcy Required.

The Bankrupt, F. P. Newport Corporation, Ltd., agrees that it will make no resistance whatever in the pending petition to have it declared a bankrupt, said Petition and Answer now being set for hearing on January 12, 1937, before the Honorable Paul J. McCormick, Judge of the Bankruptcy Court. It is understood and agreed that unless a Decree adjudicating said corporation a Bankrupt be entered prior to the 15th day of January, 1937, and that said order thereafter become final without appeal, that this contract, at its option, may be terminated and cancelled by the Bank.

Approval by Trustee and Court.

Immediately upon a Trustee in Bankruptcy being appointed by the Court in said proceeding, this contract shall be presented, by proper petition of the Trustee, to the Bankruptcy Court, for its approval, and for an order authorizing the said Trustee in Bankruptcy to become a party thereto and be bound by the terms and conditions thereof. The approval of the said Bankruptcy Court and the due execution of this Contract by the said Trustee shall be conditions precedent to the said contract continuing as a binding and effective obligation [77] on the Bank, and should said Court refuse to approve this agreement, or should the Trustee fail to execute the same, and become bound by all of the terms and conditions

thereof within five (5) days after the order approving the same has been entered, then this contract shall become utterly void and of no further force and effect, and the Bank shall be relieved of any and all obligations thereunder.

Reduction of Indebtedness.

Provided the above conditions are complied with, the Bank agrees to reduced the amount of the debt due it from the Bankrupt, as of the first day of February, 1937, to the sum of \$1,270,451.12, and to waive the difference between the amounts due as of said date, and said sum of \$1,270,451.12.

Reduction of Interest.

The said sum of \$1,270,451.12 shall bear interest, from February 1, 1937, at the rate of four per cent (4%) per annum, payable quarterly, and if not so paid, to bear like interest as the principal. It is agreed, however, that the first installments of interest shall be payable on August 1, 1937.

The principal of said indebtedness shall be payable as follows:

1. \$ 35,000.00 on or before six months from
February 1, 1937.
2. \$ 65,000.00 on or before 12 months from
February 1, 1937.
3. \$250,000.00 on or before 24 months from
February 1, 1937.
4. \$150,000.00 on or before 30 months from
February 1, 1937.

5. The balance of said indebtedness on or before thirty-six (36) months from February 1, 1937.

Foreclosure of Security for Breach of Agreement.

So long as all of the terms and conditions of this agreement are complied with by the other parties hereto, the Bank agrees not to foreclose the security held for the payment of said indebtedness.

It is distinctly understood and agreed, however, [78] that should any installment of principal or interest be not paid as herein provided, or any taxes or assessments, be not paid ten days prior to the delinquency thereof, or any of the terms and conditions of this agreement and the Declaration of Trust, herein referred to, be not complied with in the manner and at the times herein, and in said Declaration of Trust provided, that the Bank, except as otherwise provided for herein, may at its option call immediately due and payable the entire amount of the indebtedness then owing by the Bankrupt, or the Bankrupt Estate, and may immediately foreclose the security held by it, by such procedure as is provided for in said Declaration of Trust, or may foreclose the same by an action in court; provided, however, that the Bank expressly waives the right to foreclose the beneficial interest in said Trust as a pledge, as provided for in said Declaration of Trust, and also waives the provision of said trust contained on page 12 commencing in line 23 with the word "or" and up to and including the word "code" in line 27. Notwithstanding anything

to the contrary herein contained, it is agreed that the Bankrupt, or the Trustee in Bankruptcy shall have sixty (60) days after written notice within which to remedy any default for which notice has been given, before the Bank shall have the right to accellerate deferred payments of said indebtedness, and commence foreclosure of said security. The said sixty day notice herein provided for, shall be deemed the sixty day notice provided for in said declaration of Trust.

Waiver of Statute of Limitations.

In consideration of the execution of this agreement, the Bankrupt, the Receiver and the Trustee, when appointed, qualified, and upon becoming a party hereto, [79] expressly waive the provisions of any statute limiting the time when any action may be brought by the Bank on the indebtedness hereinabove referred to, or hereinafter incurred pursuant to the terms of this agreement and/or the Trust herein referred to.

Waiver of Defenses in Foreclosure.

It is understood that, one of the principal considerations moving to the Bank in this agreement is the willingness of the other parties hereto to waive any and all defenses they may claim to have to the foreclosure of the security held by the Bank, other than as to the correct amount claimed to be due the Bank. It is, therefore, expressly agreed that, provided the debt be then due, as provided for herein, in any foreclosure proceeding brought pursuant to

the terms of said Declaration of Trust, and/or this agreement, no defense thereto will be made, other than to determine the correct amount remaining due and unpaid from the Bankrupt to the Bank, at the time of said foreclosure. And it is expressly agreed that the parties hereto will not seek to enjoin or delay such foreclosure, if and when brought by the Bank.

To enable the Trustee, hereinafter appointed, to make the payment of taxes, assessments, interest and principal herein provided to be made at the time herein specified, and to do all other things herein agreed to be done, it is understood and agreed that the Trustee may negotiate for the immediate sale of certain parcels of real property now held in said Trust, and described in a Schedule annexed hereto, marked Exhibit "A", and hereby referred to and made a part hereof.

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold [80] on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

All contracts for the sale of said property shall be issued by the Bank. All payments for any of the Trust property shall be made to the Bank.

Release Price Agreed Upon.

In this connection, the Bank agrees, provided no default exists which has not been cured within sixty (60) days, as Provided for Herein, to convey the above described parcels of said property to such purchaser or purchasers as the Trustee in Bankruptcy may direct, when there shall have been paid to the Bank, as release prices thereon, the amount of money agreed upon by the parties hereto, and set forth in Exhibit "A" attached hereto; provided, however, that where the Bank shall have executed and delivered a contract of sale for any part or portion of said property to any third party, no release, transfer or conveyance thereof shall be demanded for said property other than to the Buyer thereof under said contract, so long as said sales contract remains outstanding.

Release Price Credited Only on Principal.

All sums received on the release price of said property shall be credited upon only the principal of the Bankrupt's obligations to the Bank; it being expressly agreed that all payments of interest, taxes and assessments and further Trust Advances and expenses, except as hereinafter provided, shall be made by the Trustee in Bankruptcy from funds otherwise in the Bankrupt's estate, or from funds, if any, in the hands of [81] the Bank, as Trustee, as hereinafter provided.

Distribution of Proceeds from Sales.

Out of the first money paid to the Bank, on any sale of said Trust Properties, there shall first be

paid all costs of sale, including commissions and Title Charges, not to exceed, however, twenty per cent. (20%) of the sale price of said property.

The Speical Fund

All moneys thereafter received on said sales contracts shall be placed by the Bank in a special fund until the amount of the principal remaining due on said sales contract equals the amount of the release price agreed upon for the parcel of property so sold.

Thereafter all such payments, shall be applied upon the principal of the indebtedness owing to the Bank of the Bankrupt until the release price has been fully paid.

All interest on any contract or Trust Deed note shall, when received, be placed by the Bank in the Special Fund.

Disbursement of the Special Fund

Out of the Special Fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Expenses for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy.

Use of Paper to meet Quotas on Principal

Although installment payments on the principal of the Bankrupt's agreed obligations have been hereinabove provided to be made on specific dates, it is, nevertheless, understood and agreed that said payments or quotas of the debt will be deemed to have been met, provided [82] that for such portion thereof as shall not have been paid in cash, the Bank shall hold, as trustee of said Trust, Sales Contracts, or First Trust Deeds received from the sale of said real estate sufficient in amount so that the release prices payable thereon shall equal the amount of the unpaid portion of the said principal payments or quotas. The Bank reserves the right to approve or disapprove of said paper for this purpose, but such right shall not be exercised in an arbitrary or unreasonable manner.

Such paper, so approved by the Bank, for said purpose, shall only be available for said purpose so long as it remains in good standing, and without any delinquency in the payments thereon. Should any such paper become delinquent in any respect, the Trustee in Bankruptcy shall have sixty (60) days after notice thereof, to effect a reinstatement thereof or to provide new paper acceptable to the Bank in lieu thereof. Failure to so reinstate said paper or to replace the same, or to pay in cash the amount for which it has been accepted on the quotas, shall constitute a breach of this agreement, entitling the Bank to proceed with the foreclosure

of its security without giving any additional notice of such breach of agreement.

Such paper shall not be accepted by the Bank as payment on said indebtedness, but only as security therefor.

Temporary Collection of Rents by Trustee in Bankruptcy

Although the Bank, under the express terms and conditions of said Trust No. D 7224, is entitled to execute all leases for Trust Property, and to demand and receive all rents, issues and profits from the properties held by it in Trust, the Bank agrees that, for a period of one (1) year from the first day of February, [83] 1937, the Receiver, and after his appointment, the Trustee in Bankruptcy, may collect and use all such rents, issues and profits, except the rents, issues and profits from oil, as hereinafter provided, up to a maximum of seven thousand dollars (\$7,000.00). All excesses above said sum to be promptly paid over to the Bank to be applied upon such of the obligations due the Bank by the Bankrupt as the Bank may elect to apply them upon. It is, however, expressly agreed that hereafter all leases and rental agreements shall be made and executed by the Bank, as provided for in said Trust Declaration.

Should there not be paid over to the Trustee in Bankruptcy out of the Special Fund, as hereinabove provided, the sum of \$7,000.00 during the second year, then out of the said rents, issues and

profits from said real property there shall be paid over to said Trustee in Bankruptcy sufficient to equal the said sum of \$7,000.00.

Oil Income and its Distribution

The right to collect such rents, issues and profits by the Trustee in Bankruptcy, as is provided for herein, shall be expressly subject to the condition that any rents, issues and profits from any of said property for bonuses, rentals, or royalties for or from any oil lease thereon, shall be collected only by the Bank, and shall in no event be paid over to, or collected by said Trustee in Bankruptcy.

All income from oil, in the nature of bonuses, rentals and royalties from any of the properties held by the Bank in Trust, so paid to the Bank, shall be placed by the Bank in a Special Oil Account.

The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the "Special Fund," to pay interest, taxes, assessments and expenses, as hereinabove provided, in [84] order to obviate a default; provided, however, that all sums taken from said Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due.

Except as herein provided, all amounts in said account, shall be applied on September first and

March first of each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bankruptcy and the Bank, on the principal of said indebtedness, and shall be considered as cash applied on the quotas of principal as hereinbefore set forth.

The said Declaration of Trust provides that the Bank may pay, purchase, contract or compromise any claims, liens, or incumbrances which in its judgment appear to *effect said property or the Trust.*

Payment of Claims Against Harbor Property

Pursuant thereto, it is understood and agreed that the Bank may in its discretion, purchase, settle, or compromise, the claim of any and all third persons claiming an interest in or to the Long Beach Harbor Tract, lying on Channel No. 3 of the Long Beach Harbor, or in or to any proceeds from the sales thereof, and to that end may make all necessary advances to accomplish said purposes, and all such advances shall become a part of the principal of the Bankrupt's indebtedness and shall bear interest at the rate of four per cent. (4%) per annum. It is understood that the claims referred to arise out of a certain contract or agreement known as the Syndicate No. 1 Agreement between F. P. Newport and certain third parties who furnished a portion of the purchase price of said property. [85]

No Dividends to General Creditors Pending Sale of Trust Property

Since it is contended by the Bank that the security held by it is insufficient to pay the Bankrupt's obligations, and that it will, therefore, probably become an unsecured creditor for a substantial deficiency, it is expressly agreed that no liquidating dividends shall be paid to the creditors of said Bankrupt Estate until all of the Security held by the Bank shall have been sold, and the amount of such deficiency shall be ascertained, to the end that the Bank may participate in such dividends, if any. Provided, however, that nothing herein contained shall be deemed to prevent the Trustee in Bankruptcy from paying such amounts as may be necessary to clear the title to any property not covered by the trust.

Upon the execution of this agreement by the Trustee in Bankruptcy, all defaults existing shall be deemed to have been waived by the Bank.

Overlapping Quotas to Apply

Should payments in excess of any one quota of principal be made prior to the due date thereof, such excess payments shall be construed as applying on the next maturing quota of principal.

Notwithstanding anything to the contrary herein provided, it is agreed that, upon any default occurring, and which shall not be cured within sixty (60) days from date of notice as hereinabove provided, no further or additional money in any fund

or funds held by the Bank shall be paid out of the Trust by the Bank, but all such sums of money held in any such fund shall be applied by the Bank, at its option, on any indebtedness then due the Bank.

Notwithstanding anything hereinabove to the contrary, the Bank agrees to advance and pay, prior to delinquency, the second installment of taxes for the year 1936-37 on [86] the property held by it in said Trust No. D7224. All money so advanced shall draw interest at the rate of 4% per annum, payable quarterly, and if not so paid shall bear like interest as the principal of said advances.

Such advances shall be repaid to the Bank out of any money held by it in the "Special Fund", provided such fund shall have in it at all times sufficient money to assure the payment of the installment of interest falling on August 1, 1937.

It is agreed, however, that if there is sufficient money in the "Special Fund" to pay said taxes, and to assure the payment of the installment of interest falling due on August 1, 1937, then the Bank shall be under no obligation to advance and pay said taxes.

The terms and conditions of the above-mentioned Declaration of Trust No. D7224 shall be and they hereby are modified to conform to the terms and conditions hereof.

Other than as modified hereby, the terms and conditions of said Declaration of Trust shall be and they hereby are re-affirmed, ratified and approved.

This agreement shall be executed by the parties hereto, and immediatly upon the appointment of a Trustee in Bankruptcy for said Bankrupt, and his due qualification, and upon the Bankruptcy Court approving this agreement, and authorizing him to execute the same as such Trustee, he shall sign and deliver to the Bank an executed copy thereof, and thereupon he shall, as such Trustee, be bound by the terms and conditions thereof.

This Agreement, in so far as the Receiver in Bankruptcy is concerned, is subject to the approval of the [87] Bankruptcy Court.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

(Seal) **F. P. NEWPORT CORPORATION,**
 LTD.

By F. P. NEWPORT
 President

By J. B. GRIBBLE
 Secretary

 H. F. METCALF

 As Receiver for F. P. Newport
 Corporation, an Alleged Bank-
 rupt

(Seal) **SECURITY-FIRST NATIONAL**
 BANK OF LOS ANGELES

By J. E. HATCH
 Vice-President

By RANDALL BOYD

 Asst. Secretary [88]

EXHIBIT "A"

PARCELS AND RELEASE PRICES THEREON REFERRED TO
IN THE FOREGOING AGREEMENT

Parcel No. 1.	Lots 204-205 Tract No. 250.....	Release Price \$ 65,000.00
Parcel No. 2.	Lot 3 Verdugo Estates, Plus portions of Tract 7146 and Blocks 25 and 26, Selvas de Verdugo	" " 45,000.00
Parcel No. 3.	Remaining portion of Tract 250, plus Block 22 of Selvas de Verdugo	" " 40,000.00
Parcel No. 4.	All of the remaining subdivided lots in the Verdugo area, to- gether with Block 23 & 24 Selvas de Verdugo and the por- tion of the Theodore Verdugo Allotment	" " 130,000.00
Parcel No. 5.	San Fernando Ranch Property —Lot 24, Tract 1,000.....	" " 36,500.00
Parcel No. 6.	Lot 23, Tract 1,000.....	" " 32,500.00
Parcel No. 7.	Lot 2, Tract 1,000 and Lots 1 and 2, Tract 1335.....	" " 55,000.00
Parcel No. 8.	Lots 4 & 5, Tract 1336.....	" " 45,000.00
Parcel No. 9.	Lots 6 & 7, Tract 1336.....	" " 45,000.00
Parcel No. 10.	Following Miscellaneous Prop- erties:	One Release Price 15,000.00
	A. Unsold Lots in La Cresenta Oaks	
	B. Unsold parcels in Richland Farms	
	C. Two houses, at 118 Windsor Road and 2866 Canada Blvd., both in Glendale.	

J. E. HATCH

R.B.

F. P. NEWPORT

J. B. GRIBBLE [89]

SUPPLEMENTAL AGREEMENT

This Agreement, made and entered into this 31st day of August, 1937, by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bankrupt, H. F. Metcalf, as Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a Bankrupt, and Security-First National Bank of Los Angeles, a National Banking Association, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bank,

Witnesseth:

Recitals:

Under date of January 12, 1937, the Bankrupt, the Bank, and the then Receiver in Bankruptcy, H. F. Metcalf, entered into an agreement, providing certain terms and conditions under which the properties of the Bankrupt, held by the Bank, as security for the indebtedness of the Bankrupt, might be sold, and providing therein for the reduction in amount of the Bank's indebtedness, and other matters. Reference is hereby made to said agreement for the complete terms and conditions thereof.

The said Trustee in Bankruptcy, upon his appointment, petitioned the Bankruptcy Court to approve the contract and to authorize the same to be signed by him.

The said Bankruptcy Court has approved said contract, and authorized said Trustee to execute the same, conditioned upon certain modifications, hereinafter set forth, being made thereto. All the parties are willing to modify said contract in said particulars, hence this Agreement.

No interest on the sum of \$1,270,451.12, agreed to be accepted by the Bank under the Contract of January 12, 1937, has been paid since February 1, 1937. The Bank has advanced, since said date, to-wit: on the 16th day of April, 1937, the sum of \$9,120.06 for taxes on the property held by it in said [90] Trust No. D 7224, as security for its indebtedness.

The Agreement:

Interest to be added to principal up to August 1st.

It is agreed that interest on said principal sum of \$1,270,451.12, as provided in said agreement, up to August 1, 1937, together with the sum of \$9,120.06 advanced for taxes on April 16, 1937, with interest thereon at 4% per annum from the date of such advance, to August 1, 1937, shall be added to the said sum of \$1,270,451.12, and thereafter bear the same interest as said sum. It is agreed that the said sum, augmented by said above mentioned amounts, is as of August 1, 1937, the sum of \$1,304,918.77. Said sum shall bear interest at the rate of 4% per annum from August 1, 1937, payable as follows:

Interest payment extended.

The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal.

Principal payments extended.

The principal of the Bank's indebtedness, in the agreed amount of \$1,304,918.77, shall be payable on the dates hereinafter specified, instead of on the dates specified in the said contract of January 12, 1937, and shall be paid as follows:

1. \$35,000.00 on or before March 7, 1938
2. \$65,000.00 on or before September 7, 1938
3. \$250,000.00 on or before September 7, 1939
4. \$150,000.00 on or before March 7, 1940
5. The balance of all indebtedness on or before September 7, 1940.

Repayment of taxes from special fund.

Such additional sums of money as the Bank, at its election, may advance after August 1, 1937, to pay taxes, assessments and improvement bonds against the property held by it in said Trust D 7224, as security for said indebtedness, as provided in said Declaration of Trust, together with interest thereon from [91] the date of such advance, at the rate of 4% per annum, compounded quarterly, shall be repaid to the Bank out of any money held by it in the "Special Fund" provided such fund shall have in it at all times sufficient money to assure the

payment of the installment of interest falling due on March 7, 1938.

Provided the other parties hereto shall have complied with all of the other terms and conditions of said Declaration of Trust D 7224, and the said Agreement of January 12, 1937, as modified by this Agreement, the Bank agrees that the failure of the Bankrupt or the Trustee in Bankruptcy to pay the installment of taxes for the fiscal year 1937-38, falling due in December of 1937, on the properties held by the Bank in said Trust D 7224, or should the Bank advance the money to pay such taxes, the failure to repay the same out of the "Special Fund" shall not constitute such default as to warrant immediate foreclosure of the said Declaration of Trust, and the failure to pay, or to repay the Bank, if the Bank shall advance them, the January installment of principal and interest on Improvement Bonds, a lien against any of the property held by the Bank in said Trust D 7224, shall not constitute such default as to warrant immediate foreclosure of said Declaration of Trust. And the Bankrupt, or the Trustee in Bankruptcy, shall not be called upon to pay said Tax and bond liens, or to repay the same to the Bank should it advance them, with interest as hereinabove provided, prior to the seventh day of March, 1938.

Receipts from Sales and Rentals to pass through hands of Trustee in Bankruptcy.

While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property

in said Trust, shall be paid to and be received by the Bank, it is, nevertheless, agreed, pursuant to the Order of said Bankruptcy Court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the Bank to be distributed in accordance with the terms of the said Trust No. D 7224, and the [92] agreement of January 12, 1937, as modified hereby.

It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of the Declaration of Trust securing the indebtedness owing to the Bank. Such funds shall be deposited by the Trustee in Bankruptcy in a separate fund, and not commingled with any other funds in the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness, and, except as in said agreement of January 12, 1937, provided, shall not become any part of the general assets of the Bankrupt Estate, nor charged with the payment of any of the expenses of administering said Bankrupt Estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee.

No Modification of \$7,000 Income Provision.

Nothing herein contained, however, shall modify or change the provisions of said contract of January 12, 1937, under the heading of temporary col-

lection of rents by the Trustee in Bankruptcy, by the terms of which certain rentals up to a maximum of \$7,000.00 for a limited period, are to be retained by the Trustee in Bankruptcy.

As provided for in said Agreement of January 12, 1937, it is agreed that all sales or leases of property shall be made by the Bank and the Trustee in Bankruptcy, subject to the approval of the Bankruptcy Court.

Referring to the second paragraph, on page seven of said Agreement of January 12, 1937, entitled "Release Prices Credited Only on Principal", it is understood and agreed that the Trustee in Bankruptcy shall not be required, except by an order of this court, to make any payments to the Bank out of funds derived from properties not held by the Bank under its said Trust.

Other than as expressly modified by the terms of this [93] Agreement, the said Agreement of January 12, 1937, shall remain in full force and effect, and is hereby ratified and confirmed.

Contract as Modified Affirmed.

Hubert F. Laugharn was appointed Trustee in Bankruptcy by the Referee in Bankruptcy, and the District Judge made an order vacating said appointment, and adjudging that H. F. Metcalf had been elected Trustee, from which latter order an appeal to the United States Circuit Court of Appeals of the Ninth Circuit is now pending. Said Hubert F. Laugharn petitioned the Court for instructions as to whether or not he should sign the said contract and be bound thereby in the event of

a decision confirming his appointment as Trustee and reversing the order of the District Judge, and the Court has instructed him to so sign and be so bound.

Therefore, said Hubert F. Laugharn, by his signing this agreement, becomes bound by all of the terms and conditions thereof, should he become Trustee of said Bankrupt Estate.

This contract shall be binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, the day and year first hereinabove written.

(Corporate

Seal) F. P. NEWPORT CORPORATION, LTD.

By F. P. NEWPORT

President

By J. B. GRIBBLE

Secretary

H. F. METCALF

Trustee in Bankruptcy for
the Creditors of F. P. New-
port Corporation, Ltd., a cor-
poration, Bankrupt.

(Seal) SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

RTA By V. O. WROOLIE

Vice-president

By RANDALL BOYD

Assistant Secretary

HUBERT F. LAUGHARN. [94]

“EXHIBIT B”

[Title of District Court and Cause.]

STIPULATION RE MODIFICATION OF CONTRACT OR AGREEMENT OF JANUARY 12, 1937.

It Is Hereby Stipulated and Agreed by and between the undersigned that that certain contract or agreement dated the 12th day of January, 1937, made and entered into by and between F. P. Newport Corporation, Ltd., a Delaware corporation, bankrupt, H. F. Metcalf as Receiver for said F. P. Newport Corporation, Ltd., and Security-First National Bank of Los Angeles, a national banking association, (copy of which contract or agreement is attached to, marked Exhibit “A”, and made part of the Findings and Order made and signed by the Honorable Ernest R. Utley, Referee in Bankruptcy herein, on the 13th day of August, 1937) may be and is hereby modified in the following respects and particulars only, to wit:

(1) That certain paragraph appearing on page 6 of said contract or agreement (pages 6 and 7 of said Exhibit “A”), reading as follows:

All properties not described in said Exhibit “A” shall be retained in said Trust and be leased or sold on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

Is Hereby Changed, Altered and Modified to Read As Follows:

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions subject to the approval of the Bankruptcy Court. For the purposes of this agreement it is understood that no release prices are fixed on properties not described in said Exhibit "A".

(2) That certain paragraph appearing on page 6 of said contract or agreement (page 7 of said Exhibit "A") reading as follows: [95]

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy and shall be subject to the approval of the Bankruptcy Court.

Is Hereby Changed, Altered and Modified to Read As Follows:

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to and shall be subject to the approval of the Bankruptcy Court.

Dated this 14th day of October, 1937.

(Corporate

Seal)

F. P. NEWPORT CORPORATION, LTD.

By F. P. NEWPORT

President,

By J. B. GRIBBLE

Secretary

(Corporate

Seal)

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

By C. W. CRAIG

Vice President

By RANDALL BOYD

Assistant Secretary

H. F. METCALF

As Trustee in Bankruptcy of
F. P. Newport Corporation,
Ltd. (H. F. Metcalf)

HUBERT F. LAUGHARN

L. M. CAHILL

Counsel for F. P. Newport
Corporation, Ltd.

W. C. SHELTON,

GEORGE BURCH, JR., and

EARL E. MOSS

By W. C. SHELTON

Counsel for said Security-
First National Bank of Los
Angeles

ROBERT B. POWELL

Counsel for Hubert F. Laugh-
arn

BAILIE, TURNER & LAKE

By NORMAN A. BAILIE

Counsel for H. F. Metcalf,
Trustee.

Approved this 14th day of October, 1937.

PAUL J. McCORMICK

United States District Judge.

[96]

EXHIBIT "C"

[Title of District Court and Cause.]

STIPULATION RE MODIFICATION OF SUPPLEMENTAL AGREEMENT DATED
AUGUST 31, 1937

It Is Hereby Stipulated and Agreed by and between the undersigned that that certain "Supplemental Agreement" dated the 31st day of August, 1937, and made and entered into by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, Bankrupt, H. F. Metcalf, as Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a Bankrupt, and Security-First National Bank of Los Angeles, a National Banking Association, (copy of which "Supplemental Agreement" is attached to, marked Exhibit "C" and made a part of the Findings and Order made and signed by the Honorable Ernest R. Utley, Referee in Bankruptcy herein, on the 13th day of August, 1937), may be and is hereby modified in the following respects and particulars only, to wit:

Those certain paragraphs appearing on pages 3 and 4 of said "Supplemental Agreement" and reading as follows:

“While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust, shall be paid to and be received by the Bank, it is, nevertheless, agreed, pursuant to the Order of said Bankruptcy Court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the Bank to be distributed in accordance with the terms of the said Trust No. D 7224, and the agreement of January 12, 1937, as modified hereby.

“It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of [97] the Declaration of Trust securing the indebtedness owing to the Bank. Such funds shall be deposited by the Trustee in Bankruptcy in a separate fund, and not commingled with any other funds in the Bankrupt Estate, and shall be deemed earmarked for application on the Bank’s indebtedness, and, except as in said agreement of January 12, 1937, provided, shall not become any part of the general assets of the Bankrupt Estate, nor charged with the payment of any of the expenses of administering said Bankrupt Estate, and nothing herein contained shall pre-

vent the Court from fixing fees on the basis of all money passing through the hands of the Trustee.”

Are Hereby Changed, Altered and Modified to Read as Follows:

“While the said Declaration of Trust No. D 7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D 7224 and the agreement of January 12, 1937, as modified hereby.

“Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and

except as hereinafter provided, be, while in his possession, impressed with the lien of the Declaration of Trust securing the indebtedness owing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorneys of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to anyone whomsoever from the assets of this Bankrupt Estate, is, in accordance with the law, left entirely to the determination of the [98] court having jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto."

Dated this day of October, 1937.

(Corporate Seal)

F. P. NEWPORT CORPORA-
TION, LTD.

By F. P. NEWPORT
President

By J. B. GRIBBLE
Secretary

(Corporate Seal)

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

By L. W. CRAIG
Vice President

By R. T. ADAMS
Assistant Secretary

H. F. METCALF

As Trustee in Bankruptcy of
F. P. Newport Corporation,
Ltd.

HUBERT F. LAUGHARN

L. M. CAHILL

Counsel for F. P. Newport
Corporation, Ltd.

W. C. SHELTON, GEORGE
BURCH, JR. and EARL E.
MOSS

By W. C. SHELTON

Counsel for Security-First Na-
tional Bank of Los Angeles

ROBERT B. POWELL

Counsel for Hubert F. Laugharn

BAILIE, TURNER & LAKE

By NORMAN A. BAILIE

Counsel for H. F. Metcalf,

Trustee in Bankruptcy

Approved this 29th day of October, 1937.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Dec. 31, 1940. Ernest R. Utley,
Referee. Filed Nov. 28, 1941. R. S. Zimmerman,
Clerk. [99]

[Title of District Court and Cause.]

FIRST REPORT AND ACCOUNT CURRENT
OF H. F. METCALF, TRUSTEE IN BANK-
RUPTCY HEREIN.

Comes now your petitioner, H. F. Metcalf, and respectfully represents unto the Court:

1. That heretofore and on March 18, 1937, your petitioner was by order of the above entitled District Court appointed Trustee in Bankruptcy herein; that thereafter on March 19, 1937, he duly qualified as such Trustee and now is the duly appointed, qualified and acting Trustee in Bankruptcy herein.

2. That an appeal was taken by certain creditors from the order so appointing your petitioner as Trustee to the United States Circuit Court, Ninth

Circuit, and thereafter said order appointing your petitioner as Trustee was duly affirmed by said Circuit Court.

3. That prior to the adjudicating in bankruptcy herein, your petitioner was Receiver in Bankruptcy of this estate; that as such Receiver he entered into a certain agreement with Security-First National Bank of Los Angeles wherein it was provided, in substance, for liquidation of certain properties held by said Bank under its trust No. D-7224.

4. That upon appointment and qualification of your petitioner as such Trustee he filed with this court a petition for an order authorizing him as such Trustee to approve and be bound by the terms of the said agreement with said Bank; that said petition came on regularly for hearing before this Court pursuant to notice to creditors as required by law and was partially heard on April 19, 1937.

5. That thereafter, pursuant to leave of Court, petitioner [101] filed an amendment to his petition and the matter again came on regularly for hearing on June 7, 1937, whereupon evidence was introduced and the matter was continued to June 18, 1937.

6. That in the interim the parties to the said agreement entered into a modification thereof in certain respects; that thereafter on August 13, 1937, the Referee duly made and signed his findings of fact and order approving the said agreement as modified and authorizing and directing your petitioner as such Trustee to approve and execute said

agreement as modified. Reference is hereby made to said findings and order, agreement and modification for further particulars.

7. That thereafter a review of said findings and order was taken by certain creditors. That on November 5, 1937, said findings and order were approved and confirmed by the District Court as modified by certain stipulations dated October 14, 1937, and October 29, 1937, both of which were approved by the Court and are on file in the office of the Clerk of said District Court. Reference is hereby made to said documents for further particulars.

8. That thereafter an appeal from the order of the District Court so approving and confirming the said findings and order of the Referee was allowed to certain creditors. That said matter is now pending in the United States Circuit Court of Appeals, Ninth Circuit, proceeding numbered 8703 in the office of the Clerk of said Circuit Court.

9. That in the order allowing said appeal (8703) the said United States Circuit Court provided that, pending the determination thereof, your petitioner as such Trustee might, on terms and conditions approved by the Bankruptcy Court, sell or lease for oil well drilling or any other purpose property involved in the agreement hereinbefore mentioned, and provided for the impounding of funds derived therefrom. Reference is hereby made to a certified copy of said order on file with this Court for further particulars. [102]

10. That certain of the property held by Security-First National Bank of Los Angeles under its trust No. D-7224 is situate in what is believed to be a proven oil field and was believed to be of considerable value as potential oil property. That after several months of negotiations an oil and gas lease was entered into by and between your petitioner as said Trustee and said Security-First National Bank of Los Angeles and said Bankrupt, as Lessors, and Universal Consolidated Oil Company, as Lessee, which provided for the development of oil and gas and other hydrocarbon substances believed to underlie some of the properties held by said Bank under its said trust.

11. That your petitioner filed a verified petition for an order authorizing, approving and confirming said lease. That thereafter upon proceedings duly had before the Court, pursuant to notice duly given as required by law, an order was made and signed by the Referee authorizing, approving and confirming said lease. Reference is hereby made to said order for further particulars.

12. That pursuant to the terms of said lease the Lessee went into possession of the property covered thereby and is now in the process of drilling a well on the premises and endeavoring to obtain permits from the City of Long Beach for the drilling of additional wells thereon.

13. That there has been paid to your petitioner as Trustee, pursuant to the terms of said lease, the sum of \$25,000.00 in cash and that said sum has

been deposited with Security-First National Bank of Los Angeles in a special account in the name of your petitioner as such Trustee.

14. That your petitioner has been informed that the City of Long Beach and the State of California claim or assert that some portions of the property covered by the said oil and gas lease are tidelands and that by reason thereof said City of Long Beach and said State of California assert some right, title and interest in or [103] to portions of said property. That said asserted claims have made it exceedingly difficult for the Lessee to obtain the necessary permits for the drilling of the wells. That in order to have the matter determined judicially your petitioner filed a petition to quiet his title to the whole of said property against any claim so asserted by City of Long Beach and its officers or the State of California and its officers. That an order to show cause has been issued directed to said municipality and its officers and to the said State and its officers; that service of said order to show cause has been made; that a partial hearing has been had before the Court; that the matter is now pending and undetermined. Reference is hereby made to the petition and order to show cause on file herein for further particulars.

15. That upon the appointment and qualification of your petitioner as such Trustee he duly filed his return showing no exempt property; that your petitioner mailed to the Commissioner of Internal Revenue a notice of the adjudication in bankruptcy of

said corporation; that your petitioner recorded in the various counties where said corporation has real property certified copies of the order approving his bond as such Trustee; that your petitioner obtained a bar order in re taxes; and that your petitioner reviewed and made a general study of all of the properties of the bankrupt.

16. That upon application of your petitioner an order was made herein authorizing the employment of Messrs. Bailie, Turner & Lake as his counsel; that said counsel have attended to numerous legal matters in this estate.

17. That upon application of your petitioner orders were made herein authorizing him to employ Mr. F. P. Newport, the former President of the bankrupt corporation, as an assistant in and about the management of the affairs of this estate at a salary of \$250.00 per month, and to employ Mr. J. B. Gribble as bookkeeper and accountant at a salary of \$150.00 per month. [104]

18. That several hearings have been had on the application of Eugene Kelly, Esq. for leave to sell certain real property of this estate under execution on the ground that a judgment, of which Eugene Kelly is assignee, is a lien upon said property and was such a lien thereon for more than four months prior to the filing of the petition herein; that the matter has been continued from time to time and is still pending and undetermined. Reference is hereby made to the documents on file herein for further particulars.

19. That Addie E. Hurlburt Garland heretofore obtained an order authorizing the foreclosure of a mortgage on certain property held by the **bankrupt** estate; that petitioner has not been served in any such action.

20. That several easements for the construction of power lines, flood water controls, and sewer systems have been granted, pursuant to authority of this Court, as will more fully appear by reference to the pleadings on file herein.

21. That portions of the property in **San Fernando** Valley have been leased for agricultural purposes as will more fully appear by reference to petitions and orders in relation thereto on file herein.

22. That certain improved property of this estate has been rented on a month to month basis and that certain property at the harbor has been let for use as a boat landing.

23. That an order has been made by the Court authorizing Bank of America, a national trust and savings association, to foreclose a mortgage on certain property of this estate; that no sale of said property has been had; reference is hereby made to the pleadings on file herein for further particulars.

24. That among the assets of said estate are certain scattered lots in the **Wilmington** area which could not, because of their size and location, be drilled upon for the production of oil. That by leave of this Court your petitioner entered into certain [105] community oil and gas leases with Bank Line Oil Company; that some income has been and is

being derived therefrom as will hereinafter appear. Reference is hereby made to the petitions and orders on file herein for further particulars.

25. That pursuant to leave of Court, your petitioner has sold certain personal property of this estate as will more fully appear by reference to the returns of sale on file herein.

26. That pursuant to an order of court certain outstanding beneficial interests in Title Guarantee and Trust Company's trust No. P-1512 were purchased and the said trust was terminated and the property therein transferred and conveyed to the Security-First National Bank of Los Angeles under its trust D-7224. Reference is hereby made to the petitions and order on file herein for further particulars.

27. That at the date of the filing of the petition in bankruptcy herein said Security-First National Bank of Los Angeles had on hand in a release fund provided for under the terms of its trust D-7224 a balance in excess of the sum of \$765.80. That thereafter said Bank transferred from said released fund the sum of \$765.80 and applied the same towards the payment of interest or advances made by it as hereinafter set forth.

28. That pursuant to an order of this Court petitioner was substituted as a party defendant in that certain action brought in the superior court of the State of California in and for the County of Los Angeles by the California Improvement Bond Co. against F. P. Newport Corporation, Ltd., et

al., which action was for the foreclosure of certain street bonds against the property described in the complaint on file in said action, which property belonged to said bankrupt; that said bonds had been in default for some time; that petitioner made earnest effort to arrange for funds to pay off said bonds but was unable to do so in view of the fact that the property was also covered by a mortgage; that recently a judgment [106] for foreclosure of said bonds was entered in said action; that the total amount is \$4346.85 plus costs of \$32.70.

The foregoing is a brief resume of some of the proceedings had in the matter of this estate and is not intended to be a detailed statement of all of the work done by your petitioner or his counsel or of the legal proceedings had herein.

That at the time of the appointment and qualification of your petitioner as such Trustee there was transferred to his account, as such Trustee a balance of \$373.50 theretofore in his possession as Receiver. Reference is hereby made to the final account of the Receiver on file herein.

That upon the appointment and qualification of your petitioner as such Trustee there was delivered to him by Hubert F. Laugharn the sum of \$556.30 which represented the balance of funds in his possession for the brief period he acted as Trustee herein. Reference is hereby made to the report of said Hubert F. Laugharn on file herein.

That there is attached hereto, marked Exhibit A hereby referred to and made part hereof, a state-

ment of the receipts and disbursements of your petitioner as Trustee covering the period from March 3, 1937, to February 19, 1938, both dates inclusive; that by said statement it appears that your petitioner has received a total of \$8490.99 from the sources shown in said statement; that he has expended a total of \$7,739.35 for the purposes therein set forth; that there is a balance on hand as of February 19, 1938, in the sum of \$751.64.

That the sum of \$435.28 has been received by your petitioner as a balance on a contract for the sale of Lot Twenty, Block Twelve, Long Beach Harbor Tract, Los Angeles County, California, in addition to the receipts shown in said Exhibit A. That an order was made herein directing said sum to be paid by petitioner, less the recordation fees and revenue stamps, to Eugene Kelly and Louise [107] S. Joerg on the grounds that by reason of their respective judgment liens they were entitled to receive the same. Reference is hereby made to the order of court on file herein for further particulars. That petitioner upon payment of said sum executed and delivered a Trustee's deed to said property to George H. Beilfuss, in pursuance of an order of this Court. That pursuant to an order of this Court the said sum of \$435.28 was deposited in a special account and was disbursed as set forth in Exhibit B hereto attached, hereby referred to and made part hereof.

That Security-First National Bank of Los Angeles has advanced on behalf of your petitioner as

such Trustee and for the purpose of paying for the beneficial interests in Title Guarantee and Trust Company's trust P-1512 hereinbefore referred to, and for the payment of taxes and assessments against the property held by said Bank under its trust D-7224, a total of \$57,691.31 which has been added to the principal of the indebtedness due it, all of which is secured by its said trust D-7224; that an itemized statement of the advances so made is attached hereto marked Exhibit C hereby referred to and made part hereof.

That pursuant to an order of court on file herein, reference to which is hereby made for further particulars, certain royalties payable under community oil and gas leases with the Bank Line Oil Company and accruing on account of properties, title to which is held by said Bank under its trust D-7224, were paid to said Bank. That said Bank has received on account of such royalties the sum of \$1,993.99, and on account of the condemnation of a portion of Lot Seventy-Five, Tract 1473, the sum of \$195.00 for a flood control channel; that said Bank now has on hand in a special account \$2,188.99, all as more fully set forth in Exhibit D attached hereto, hereby referred to and made part hereof.

That out of the \$25,000.00 deposited in a special account with Security-First National Bank of Los Angeles, as hereinbefore [108] mentioned, and pursuant to an order of Court, your petitioner has paid to said Bank the sum of \$10,050.01 to satisfy the second half of the 1937-38 taxes assessed against

certain properties described in his petition filed herein on March 14, 1938. Reference is hereby made to said petition and order for further particulars.

Wherefore petitioner prays that a time and place be designated by this Court for the hearing of the foregoing report and account; that notice thereof be given as required by law; that, upon the hearing, an order be made herein ratifying, approving and confirming said report and account; and for such other and further relief as may be proper.

H. F. METCALF

Petitioner-Trustee in Bankruptcy.

BAILIE, TURNER & LAKE

By ALLEN T. LYNCH

Attorneys for said Trustee. [109]

EXHIBIT A

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

March 3, 1937, to February 19, 1938, Inclusive

Cash Balance Forward From Receiver, as per his Report.....	\$ 373.50
Cash Balance from H. F. Laugharn, Trustee, as per his Report	556.30

Receipts

Rentals

Verdugo Park—Misc. Organizations—

Sundry dates\$1,700.51

Houses—118 W. Windsor Road—3/1/37 - 3/1/38 300.00

2866 Canada Blvd.,—6/1/37 - 7/1/37..... 33.75

—8/16/37 - 12/1/37... 148.75

Waterfront—Small Building—10/6/36 - 10/31/37 160.00

—Boat Landing—5/1/37 - 5/1/38..... 1,140.00

—5/8/37 - 5/8/38..... 1,140.00

Ranch Leases and Rentals

House—7/1/37 - 3/1/38 120.00

Barn Space—Misc. 40.84

Leases—1/1/37 - 12/31/37 715.00

—2/1/38 - 12/31/38 135.00

Miscellaneous Rentals—Ice Cream Location..... 2.50

Total Rentals Collected.....\$5,636.35

Refund of Street Improvement Bond Interest..... 61.17

Interest Collections 27.61

Contracts Receivable 248.64

Tax Collections 16.45

Oil Rents and Royalties..... 1,320.97

Sale of Equipment..... 250.00

Total Receipts 7,561.19

Total Balance Forward and Receipts..... \$8,490.99

Disbursements

Telephone—Office and Verdugo Woodlands.....	\$	590.35	
Water, Electricity & Gas—Verdugo Park and Adobe		91.68	
Property Upkeep Expense			
Park—Supplies		64.58	
—Labor—Clean-up		369.49	
Ranch—Labor		13.00	
—Expense		153.36	
Canada Boulevard House—Labor & Expense.....		21.87	
Windsor Road House—Labor & Expense.....		19.98	
Office Expense—Supplies, Stamps, etc.....		193.53	
Rent—Office		800.00	
Footings Forward	\$2,317.84		\$8,490.99
			[110]

Page 2

Footings Forward From Previous Page..... \$8,490.99

Disbursements (continued)

Footings forward from previous page.....	\$2,317.84	
Pay-roll—Stenographer—special—time to time.....	37.51	
—Bookkeeper—3/15/37 - 2/19/38	1,670.62	
F. P. Newport—Services per Court Order		
3/15/37 - 2/19/38	2,784.36	
—Automobile mileage for inspection of properties	450.00	
Trustee's Bond	40.00	
Reporter and Court Fees.....	154.47	
Advertising	40.38	
Social Security Tax.....	84.50	
Street Improvement Bonds—Principal.....	80.68	
—Interest	66.49	
Moving Furniture from Harbor Office.....	12.50	
Total Disbursements		7,739.35
Balance on Hand February 19, 1938.....	\$	751.64
		[111]

EXHIBIT B

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS
SPECIAL ACCOUNT CITIZENS NATIONAL TRUST
& SAVINGS BANK

September 3, 1937, to December 20, 1937, Inclusive

Receipts

September 3, 1937—Deposit arising from tender of payment on Lot 20, Block 12, Long Beach Harbor Tract..... \$ 435.28

Disbursements

Per Court Order of December 8, 1938

Recording Fees and Revenue Stamps.....\$ 4.00

Eugene Kelly—a/c Bennett Judgment..... 215.64

Louise S. Joerg and James T. Boyle, her Attorney

—a/c Joerg Judgment..... 215.64

Total Disbursements \$ 435.28

[112]

EXHIBIT C

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS
THROUGH SECURITY FIRST NATIONAL BANK TRUST D-7224

March 3, 1937, to December 31, 1937, Inclusive

Receipts

Advanced in behalf of H. F. Metcalf as Trustee, and the Bankrupt Estate, by Trust Department of Security First National Bank, in payment of Sundry Accounts.....	\$57,691.31
Transferred from Release Fund at Security First National Bank	765.80
Total Advanced and Transferred.....	<u>\$58,457.11</u>

Disbursed by Security First National Bank as Follows:

Street Improvement Bonds—Principal	\$ 4,780.81
—Interest	475.82
Taxes	19,239.57
Purchase of Beneficial Interests in Trust P 1512 at Title Guarantee and Trust Company, to clear title of outside interests in Waterfront property	33,195.11
Interest paid Security First National Bank, on account of Advances.....	765.80
Total Disbursements	<u>\$58,457.11</u>

EXHIBIT D

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF FUND BALANCES

HELD IN TRUST D-7224, SECURITY FIRST NATIONAL BANK

as at December 31, 1937

Special Oil Account

From Bankline Oil Company for Royalties and Rentals on
lots in Tract 2016, Dominguez Harbor Tract, and Long
Beach Harbor Tracts.....\$1,993.99

Special Fund

Cash received for portion of Lot 75, Tract 1473 for use of
land for Flood Control Channel..... 195.00

Total of Special Funds on Deposit.....\$2,188.99

(Verified)

[Endorsed]: Filed Mar 29 1938 Ernest R. Utley,
Referee. Filed Nov. 28 1941 R. S. Zimmerman,
Clerk. [114]

[Title of District Court and Cause.]

SECOND REPORT AND ACCOUNT CURRENT
OF H. F. METCALF, TRUSTEE IN BANK-
RUPTCY HEREIN.

Comes now your petitioner, H. F. Metcalf, and
respectfully represents unto the Court:

1. That on March 18, 1937, the petitioner was
by order of the District Court duly appointed Trus-
tee in Bankruptcy herein; that thereafter on March
19, 1937, he duly qualified as such Trustee and ever

since has been and now is the duly appointed, qualified and acting Trustee herein.

2. That on or about March 29, 1938, your petitioner as such Trustee duly filed with this Court his first report and account current; that thereafter said first report and account current was duly approved by said Court.

3. That your petitioner hereby renders his Second Report and Account Current covering the period commencing with February 19, 1938, and ending October 31, 1938.

4. That since the filing of the said first account the appeal referred to therein as pending in the United States Circuit Court of Appeals, Ninth Circuit, case No. 8703, has been determined and the decision of the lower court has been duly affirmed and the mandate of said Circuit Court has been duly spread upon the minutes of the above entitled District Court.

5. That under the oil and gas lease referred to in said first account and report, the Universal Consolidated Oil Company, a corporation, as Lessee, has drilled on the premises covered by said lease 4 wells; that all of said wells are presently producing oil and gas; that said Lessee is in the process of drilling 1 [115] additional well on said leased premises.

6. That a hearing was had before Honorable Ernest R. Utley, Referee in Bankruptcy on the Trustee's petition to quiet title and on the order to show cause directed to State of California and City

of Long Beach, more particularly referred to in said petition and on the objections to the jurisdiction of the Referee made by respondents, which objections were overruled. That respondents took a review thereof to the District Court of the United States, Southern District of California, Central Division; that said District Court affirmed the ruling and order of the Referee. That an appeal was taken to the United States Circuit Court, Ninth Circuit where the matter is now pending; that said appeal is No. 8966 in the office of the Clerk of said Circuit Court.

7. That portions of the property in this estate are situate in San Fernando Valley, which portions have been leased for agricultural purposes, as will more fully appear by reference to petitions and orders on file herein. That certain improved property of this estate has been rented on a month to month basis; and that a portion of said property has been rented for use as a boat landing.

8. That from scattered lots, which are not under the Declaration of Trust No. D-7224 in Security-First National Bank of Los Angeles, certain income has been received from community oil and gas leases, all as more particularly reflected in Exhibit "A" hereto attached, hereby referred to and made part hereof.

9. That in order to procure necessary permits for drilling additional wells on the property leased to Universal Consolidated Oil Company certain agreements were made and entered into with City of Long Beach, full particulars of which are set

forth in the Trustee's petition on file herein and order thereon made by this Court; reference is hereby made to said petition and order for further particulars.

10. That a large income has been received from oil produced [116] and saved from the premises let to said Universal Consolidated Oil Company, which income has been deposited in a special account carried in the name of said Trustee in Bankruptcy with Security-First National Bank of Los Angeles, Sixth and Spring Streets Branch.

11. That said Trustee has made two sales of real property for a total sum of \$5500.00, as will more fully appear from the petitions and orders on file herein.

12. That there is attached hereto, marked Exhibit "A" hereby referred to and made a part hereof, a statement of the receipts and disbursements of said Trustee covering the period from February 19, 1938, to and including October 31, 1938. That on pages marked A (1) and (2) of said Exhibit it appears that the Trustee received from the sources therein indicated the sum of \$8,884.64, which added to the amount on hand of \$751.64 totals \$9,636.28; that by the said pages it appears that said Trustee disbursed for the purposes therein noted the sum of \$9,010.03, leaving a balance on hand in the general fund in the sum of \$626.25. That on page marked A (3) it appears that the Trustee received under the Universal Consolidated Oil Company lease a total of \$183,068.60 and disbursed therefrom for the purposes noted \$10,701.39, leaving a balance

on hand in the special account of \$172,367.21. That on page marked A (4) appears a statement of moneys paid direct to Security-First National Bank of Los Angeles under the community oil lease and from the bond refund and payment made to said Bank by said Trustee for and on account of the release price of sale of real estate made by said Trustee, together with a statement of charges paid by said Bank out of said funds, leaving a balance of \$3,533.16 in the hands of said Bank for application on indebtedness owing it. That the total receipts of your Trustee, including money paid direct to said Security-First National Bank of Los Angeles since his appointment and qualification as Trustee, have amounted to \$205,092.16.

13. That no compensation has been allowed to or paid to [117] said Trustee.

Wherefore your petitioner prays: That a time and place be designated by this Court for the hearing of the foregoing Second Report and Account Current; that notice of such hearing be given as required by law; that upon the hearing an order be made herein ratifying, approving and confirming the said Second Report and Account; that an allowance of \$2500.00 be made to your petitioner as Trustee on account of his compensation; and for such other and further relief as may be proper.

H. F. METCALF

Petitioner-Trustee

BAILIE, TURNER & LAKE

By ALLEN T. LYNCH

Attorneys for said Trustee. [118]

EXHIBIT A

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

February 20, 1938, to October 31, 1938

Cash Balance Forwarded From Report February 19, 1938..... \$ 751.64

Receipts

Rentals

Verdugo Park—Misc. Organizations—

Sundry Dates\$ 1,204.50

Houses—118 W. Windsor Road 3/1/38 - 11/1/38 200.00

—2866 Canada Blvd.—12/1/37 - 5/1/38..... 219.00

Waterfront—small building 10/31/37 - 10/31/38 150.00

Boat Landing—5/1/38 - 10/1/38..... 500.00

—5/7/38 - 10/7/38..... 400.00

Ranch Leases and Rentals

House—3/1/38 - 10/15/38 145.00

Barn Space—Miscellaneous 70.00

Leases—Farming Operations 1,005.00

60 Acre Parcel

Farming Operations 300.00

Rotary Mud Deposits..... 298.48

Total Rentals Collected.....\$4,491.98

Refund of Street Improvement Bond Interest..... 54.55

Interest Collections 25.00

Ranch Equipment Sold..... 45.00

Oil Royalties—Harbor District Lots..... 718.11

Notes Receivable 50.00

Real Estate Sales..... 3,500.00

Total Receipts 8,884.64

Total Balance Forward and Receipts..... \$9,636.28

Disbursements

Telephone—Office and Verdugo Woodlands.....	\$ 421.74	
Water, Electricity & Gas—Verdugo Park and Adobe	87.01	
Property Upkeep Expense		
Park—Supplies	75.85	
—Labor—Clean-up	481.40	
Ranch—Labor	59.15	
—Expense	70.26	
Canada Boulevard House—Labor and Expense.....	77.01	
Windsor Road House, Labor & Expense.....	6.90	
Office Expense—Supplies, Stamps, etc.....	99.53	
Rent—Office to January 1, 1938.....	240.00	
Pay-roll—Stenographer—special—time to time.....	4.17	
—Bookkeeper—2/29/38 - 10/31/38	1,225.14	
F. P. Newport—Services—2/19/38 - 11/30/38.....	2,289.39	
—Automobile mileage for inspection of properties	390.30	
Footings Forward	\$5,527.85	\$9,636.28
		[119]

Page 2

Exhibit A (2)

Footings Forward From Previous Page.....		\$9,636.28
Disbursements (Continued)		
Footings forward from previous page.....	\$5,527.85	
Trustees Bond	40.00	
Reporter and Court Expense.....	124.06	
Appellee's Brief and Costs—Neblett Matter.....	57.57	
For sale signs.....	60.00	
Social Security Tax.....	75.76	
Ranch Equipment	114.99	
Release—Real Estate—Bank Trust.....	2,800.00	
Commission on sale of Real Estate.....	175.00	
Title Expense—Sale of Real Estate.....	34.80	
Total Disbursements		9,010.03
Balance on Hand October 31, 1938.....		\$ 626.25
		[120]

Exhibit A (3)

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

SPECIAL OIL ACCOUNT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

February 10, 1938, to October 31, 1938, Inclusive

Receipts

Cash Bonus on Lease.....	\$ 25,000.00
Cash Bonus out of Oil.....	25,000.00
Royalties Received	133,068.60
Total Receipts	<u>\$183,068.60</u>

Disbursements

Taxes Paid	\$10,634.77
Street Improvement Bond Principal and Interest	66.62
Total Disbursements	<u>10,701.39</u>
Balance in Bank October 31, 1938.....	<u>\$172,367.21</u>

[121]

Exhibit A (4)

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

THROUGH SECURITY FIRST NATIONAL BANK TRUST D-7224

Receipts

Oil Royalties on Harbor Lots.....	\$2,014.89
Refund of Bond Penalty.....	8.77
Sale Lots 12 & 13, Block B, Fernbrook Place Tract.....	2,800.00
Total Receipts	<u>\$4,823.66</u>

Disbursements

Tax Paid on Solvent Credits.....	\$ 2.87
Oilfield Testing & Engineering Co., Inc.....	1,253.23
Filing Tax Claims for Refund.....	34.40
Total Disbursements	<u>1,290.50</u>
Excess Receipts Over Disbursements for Application on Previous Advances.....	<u><u>\$3,533.16</u></u>

(Verified)

[Endorsed]: Filed Dec 8 1938 Ernest R. Utley,
Referee. Filed Nov 28 1941. R. S. Zimmerman,
Clerk [122]

[Title of District Court and Cause.]

SUPPLEMENT TO SECOND REPORT AND
ACCOUNT CURRENT OF H. F. METCALF,
TRUSTEE HEREIN.

Comes now your petitioner H. F. Metcalf and respectfully represents unto the Court:

1. That on Decmeber 8, 1938, petitioner as Trustee in Bankruptcy of this estate filed herein his Second Report and Account Current. That said Trustee herewith presents and files this supplement to said Second Report and Account Current covering the period from October 31, 1938, to and including December 21, 1938.

2. That there is attached hereto, marked Exhibit A, hereby referred to and made part hereof a statement of the receipts and disbursements of said Trustee covering the period from October 31, 1938, to and including December 21, 1938. That said Exhibit A does not include receipts from oil royalties paid pursuant to lease made and entered into with Universal Consolidated Oil Company, nor receipts received by Security-First National Bank of Los Angeles direct under the terms of the community oil and gas lease made and entered into with Bankline Oil Company covering property the legal title to which is held by said Bank under its trust D-7224.

3. That there is attached hereto, marked Exhibit B, hereby referred to and made a part hereof, a statement of oil royalties received during said period from October 31, 1938, to December 21, 1938, inclusive, under the said lease with Universal

Consolidated Oil Company and deposited in the special account carried by said Trustee with the Security-First National Bank of Los Angeles, Sixth and Spring Streets, Los Angeles, California, together with a statement of disbursements made from said fund. It will be observed that there [123] has been paid from said account the sum of \$170,000.00 which payment was made to said Bank and applied by it in accordance with an order made by this Court under date of December 6, 1938. Reference is hereby made to said order for further particulars.

4. That there is attached hereto, marked Exhibit C hereby referred to and made a part hereof, a statement of moneys received by said Bank during the period of October 31, 1938, to December 21, 1938, inclusive, for and on account of oil royalties paid under the terms of the community oil and gas lease, hereinbefore mentioned, to the said Bank together with a statement of disbursements and charges against the said fund.

5. That pursuant to the terms and provisions of those certain contracts made and entered into with the City of Long Beach and heretofore approved by this Court, (reference is hereby made to said order and copies of said contracts on file with this Court), there has been deposited with the Bank of America National Trust & Savings Association, 4th and Pine Branch, Long Beach, California, the sum of \$8994.23. That said funds and such additional funds as may be from time to time deposited therein are to be held until the title to

certain property is determined whereupon they will be disbursed in accordance with said contracts.

6. That since the filing of the Trustee's Second Report and Account Current counsel for said Trustee have been served with a petition for writ of certiorari and brief in support thereof filed by McAdoo & Neblett and Wm. H. Neblett, to the Supreme Court of the United States. That said petitioners seek to have said Court review a decision of the Circuit Court of Appeals of the United States for the Ninth Circuit reported under the title of *In Re F. P. Newport Corporation, Ltd. McAdoo & Neblett, et al., vs. F. P. Newport Corporation, Ltd., et al*, 98 Fed. (2) 453. Counsel for said Trustee are preparing a brief in reply to the brief filed in support of said petition by petitioners. [124]

7. That since the filing of said Second Account and Report, counsel for said Trustee have prepared and filed an answer to a brief by City of Long Beach, et al. pertaining to the appeal referred to in paragraph 6 of the said Second Report and Account.

Wherefore petitioner prays: That his Second Report and Account Current and this supplement thereto be approved and that said Trustee have the relief prayed for in said Second Report and Account Current; and for such other and further relief as may be proper.

H. F. METCALF

Petitioner-Trustee

BAILIE, TURNER & LAKE

By ALLEN T. LYNCH

Counsel for said Trustee. [125]

EXHIBIT A

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

November 1, 1938 to December 21, 1938, Inclusive

Cash Balance Forwarded From Report October 31, 1938..... \$ 626.25

Receipts

Rentals

Verdugo Park—Misc. Organizations—

Sundry Dates\$ 11.00

Houses—118 W. Windsor Road—11/1/38 - 1/1/39 50.00

Waterfront—Boat Landing—10/1/38 - 12/1/38..... 200.00

—10/7/38 - 12/7/38..... 100.00

Ranch Leases and Rentals—

House—10/15/38 - 12/15/38 50.00

Barn Space—Miscellaneous 25.00

Leases—Farming Operations 212.50

60 Acre Parcel—Rotary Mud Deposits..... 128.50

Oil Royalties—Harbor District Lots..... 119.71

Real Estate Sales..... 2,000.00

On Account Compromise Claim from Bullis Estate 2,000.00

Taxes Refunded 15.08

Total Receipts 4,911.79

Total Balance Forward and Receipts..... \$5,538.04

Disbursements

Telephone—Office and Verdugo Woodlands..... 92.29

Water, Electricity & Gas—Verdugo Park and Adobe 17.29

Property Upkeep Expense

Park Supplies 2.35

—Labor 61.25

Ranch—Expense 27.81

Lot Clean-up 73.50

Canada Boulevard House—Labor..... 10.50

Windsor Road House—Labor..... 1.75

Office Expense—Supplies, stamps, etc.....	6.61
Rent—Office—1/1/38 - 12/31/38	960.00
Pay Roll—Bookkeeper 11/1/38 - 12/17/38.....	274.71
F. P. Newport—Services—12/1/38 - 1/21/39.....	433.11
—Automobile mileage for inspection of properties...	140.00
Tract Office Sign Permit.....	10.00
Taxes—L. A. County—Lot 1, Block 3, Verdugo.....	26.44
Release—Real Estate—Bank Trust	1,600.00
Commission on sale of real estate.....	100.00
Title Expense—sale of real estate.....	39.30
<hr/>	
Total Disbursements	3,876.91
<hr/>	
Balance on Hand December 21, 1938.....	\$1,661.13
<hr/>	
[126]	

EXHIBIT B

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

SPECIAL OIL ACCOUNT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

November 1, 1938, to December 21, 1938, Inclusive

Cash Balance Forwarded From Report October 31, 1938.....	\$172,367.21
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Receipts

Royalties Received	37,193.51
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Total Balance Forward and Receipts.....	\$209,560.72
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Disbursements

Taxes

1938 Mineral Rights.....	\$ 1,067.44
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First half 1938-39 on property.....	9,923.27
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Street Improvement Bonds

Principal	1,700.62
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Interest	61.02
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Security-First National Bank

Apply on Interest.....	\$70,755.60
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Advances	9,832.55
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Interest on Advances	1,820.02
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Principal	87,591.83
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170,000.00

Total Disbursements	182,752.35
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Balance on Hand December 21, 1938.....	\$ 26,808.37
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[127]

EXHIBIT C

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

THROUGH SECURITY-FIRST NATIONAL BANK TRUST D-7224

November 1, 1938, to December 21, 1938, Inclusive

Receipts

Oil Royalties on Harbor Lots.....	\$ 226.79
Execution Agreements—City of Long Beach.....	2.00
Sale Lot 1, Block 3, Selvas de Verdugo.....	1,600.00
Total Receipts	<u>\$1,828.79</u>

Disbursements

Oilfield Testing & Engineering Co., Inc.....	300.00
Excess Receipts Over Disbursements.....	<u><u>\$1,528.79</u></u>

Note: Figure of \$3,533.16, shown on previous Statement, Exhibit A3, is not a cash balance, but is the total amount received in excess of disbursements, during the period covered thereby, and said sum of \$3,533.16 has been applied against previous advances.

[128]

EXHIBIT D

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF IMPOUNDED ROYALTY FUNDS
BANK OF AMERICA—FOURTH AND PINE AVENUE,
LONG BEACH

November 1, 1938, to December 21, 1938, Inclusive

Deposits

Deposited by Universal Consolidated Oil Company, as per agreement with City of Long Beach, for pro-rata production of oil, gas and sundry products, from oil lease of portion of Rancho Los Cerritos, known as Lots 18, 20 and 21, Recorder's Filed Maps, #365, for assessment purposes only\$8,994.23

Of this amount, provided it is determined that the City of Long Beach has no interest in the aforementioned property, there will be delivered to the Trustee, less deductions for any expense properly chargeable to the Trustee.....\$7,051.28

(Verified)

[Endorsed]: Filed Dec 22 1938 Ernest R. Utley,
Referee. Filed Nov 28 1941. R. S. Zimmerman,
Clerk. [129]

[Title of District Court and Cause.]

THIRD REPORT AND ACCOUNT CURRENT
OF H. F. METCALF, TRUSTEE IN BANK-
RUPTCY HEREIN.

Comes now your petitioner, H. F. Metcalf, and respectfully represents to the Court:

1. That on March 18, 1937, the petitioner was by order of the District Court duly appointed Trustee in Bankruptcy herein; that thereafter on March 19, 1937, he duly qualified as such Trustee and ever since has been and now is the duly appointed, qualified and acting Trustee herein.

2. That heretofore and on or about March 29, 1938, your petitioner as such Trustee duly filed with this Court his first report and account current, and that thereafter said report and account was duly approved by this Court; that subsequently on or about December 8, 1938, he filed his second report and account current, and on December 22, 1938, a supplement thereto, and that said second report and account current and supplement were thereafter duly approved by this Court.

3. That your petitioner hereby renders his third report and account current covering the period from December 21, 1938, to September 30, 1939, inclusive, the second account current and supplement thereto having covered the period from February 19, 1938, to and including December 21, 1938.

4. That under the oil and gas lease referred to in the second report and account current, the Universal Consolidated Oil Company, a corporation, as Lessee, has drilled on the premises covered by said lease a total of nine wells; that all of said wells [130] are presently producing oil and gas.

5. That the decision of the District Court overruling objections to the jurisdiction of the Referee in the matter of the hearing of the petition of the

Trustee to quiet title to the property covered by the oil and gas lease against certain claims asserted by the City of Long Beach has been affirmed by the United States Circuit Court, Ninth Circuit, and a petition for writ of certiorari has been filed by the City of Long Beach with the United States Supreme Court and said petition is now pending and as yet undetermined by the United States Supreme Court.

6. That portions of the property in this estate which are situate in San Fernando Valley have been leased for agricultural purposes, as will more fully appear by reference to petitions and orders on file herein; that there has been certain income from the rental of the picnic grounds situate in what is commonly known and referred to as Verdugo Park, and a portion of the property has been rented for use as a boat landing; that certain improved property has been rented on a month to month basis; and that the Trustee is receiving certain income from the deposit of rotary mud on a portion of the bankrupt estate's premises; this deposit of mud is being made in a ravine or gully and will be of considerable assistance in leveling off the property.

7. That during the period covered by this report \$792.83 has been paid direct to Security-First National Bank of Los Angeles as and for oil royalties payable under the terms of the community oil and gas lease made and entered into with the Bankline Oil Company, and covering certain scattered lots in the Harbor District; that reference is hereby made to the petition and order on file authorizing

the execution of such community oil and gas lease for further particulars.

8. That the Trustee has sold four parcels of real property, all as will more particularly appear from petitions and [131] orders on file herein, for a total of \$13,000.00, and has made and entered into a certain contract of sale with Richard A. Horsch and Ida Mae Horsch for the sale of certain real property to said Richard A. Horsch and Ida Mae Horsch for the sum of \$1250.00, payable \$300.00 cash and the balance at the rate of \$25.00 or more per month, reference being hereby made to the petition and order on file for further particulars; that additional sales totaling \$7,700.00 have been authorized and approved and confirmed by the Court, but the purchase price has not yet been paid and the matters are still pending in escrow; that the Trustee made and entered into an agreement to sell certain of the property of this estate to one Marshall Adams Smith for a total of \$16,000.00, the agreement being conditioned, however, upon the property affected by said sale being rezoned for business purposes; that the rezoning has not yet been accomplished, consequently the sale has not been consummated. Reference is hereby made to the petition and order on file for full particulars.

9. That there is attached hereto marked Exhibit A, and hereby made a part hereof, a statement of the receipts and disbursements of the Trustee for said period from December 21, 1938, to September 30, 1939, inclusive. That included in the receipts

are deposits on account of sales of real estate in the sum of \$950.00. This represents deposits made by purchasers on sales authorized but not yet fully consummated. That in addition to the disbursements reflected on said Exhibit A the Trustee has incurred additional liabilities which have not yet been paid, as follows:

Glendale Star, advertising	\$ 841.08
Glendale News Press, advertising	202.00
Unpaid office rent	400.00
<hr/>	
Total	\$1443.08

The advertising referred to represents advertising inserted in said newspapers for the purpose of stimulating sales of the properties in the Verdugo Woodlands area, and in addition to the unpaid advertising [132] the Trustee has paid for such advertising \$883.92, as appears from said Exhibit A.

10. That there is attached hereto, marked Exhibit B and hereby made a part hereof, a statement showing the payments made to Security-First National Bank of Los Angeles pursuant to the terms of the agreement made and entered into by and between said bank and the Trustee in Bankruptcy, and dated January 12, 1937, as supplemented and modified and heretofore approved by the Court. The payments reflected in this statement are made out of the oil royalties received under the Universal Consolidated Oil Company lease and deposited in a special account in the Trustee's name and carried with said Security-First National Bank of Los An-

geles. Said statement further reflects payments made for advances made by said bank, fees for executing documents, interest, taxes and street bonds. There has been paid to said bank during said period, as reflected on said statement, for application on the principal of the indebtedness owing said bank, \$138,208.17, and interest on the principal of said indebtedness in the sum of \$35,805.37. The total royalties received under the Universal Consolidated Oil Company lease for the period covered by this report amounted to \$160,527.11, which added to the cash balance in said special account as of December 21, 1938, made a total of \$187,335.48.

11. That there is attached hereto, marked Exhibit C, hereby referred to and made a part hereof, a statement showing the advances made by the Security-First National Bank of Los Angeles in order to pay Oilfield Testing & Engineering Co., Inc. for services rendered in reporting on the operations of the lessee under the oil and gas lease hereinbefore mentioned, and receipts by said bank direct from oil royalties under the Bankline Oil Company lease hereinbefore mentioned, and principal and interest paid under the Horsch contract of sale hereinbefore mentioned; that the excess of the disbursements over the receipts reflected by said statement is paid [133] by the Trustee from time to time out of the oil royalty receipts deposited in the Trustee's special account and reflected in Exhibit B.

12. That there is attached hereto, marked Exhibit D, and hereby made a part hereof, a statement reflecting the monies impounded with Bank

of America National Trust & Savings Association, Fourth and Pine Avenue, Long Beach, California, pursuant to the terms of the agreement made and entered into by and between Universal Consolidated Oil Company, the Trustee, the bankrupt, Security-First National Bank of Los Angeles, and the City of Long Beach, a copy of which agreement is on file with this Court, reference being hereby made to the same for further particulars and to the order of the Court approving said agreement.

13. That your petitioner is not requesting any allowance on account of his commissions at this time, but reserves the right to file a petition at a future time for allowance on account of such commissions.

Wherefore, your petitioner prays that a time and place be designated by this Court for the hearing of the foregoing Third Report and Account Current; that notice of such hearing be given as required by law, and that upon the hearing an order be made ratifying, approving and confirming said Third Report and Account; and for such other and further relief as may be proper.

H. F. METCALF

As Trustee in Bankruptcy of F.
P. Newport Corporation, Ltd.,
a corporation, Bankrupt.

Petitioner.

BAILIE, TURNER & LAKE

By ALLEN T. LYNCH

Attorneys for said Trustee. [134]

EXHIBIT A

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

December 21, 1938, to September 30, 1939, Inclusive

Cash Balance Forwarded From Report December 21, 1938..... \$ 1,661.13

Receipts

Rentals

Verdugo Park—Misc. Organizations—

Sundry Dates\$ 1,397.00

Houses—118 W. Windsor Road—

1/1/39 - 4/1/39 75.00

—2866 Canada Blvd.—3/1/39 - 10/1/39 236.25

Waterfront—Boat Landing—12/1/38 - 10/1/39 900.00

—12/7/38 - 10/7/39 450.00

—Small Building—10/31/38 - 8/31/39 125.00

Ranch Leases and Rentals

House—12/15/38 - 3/8/39 55.00

Barn Space—Miscellaneous 50.00

Leases—Farming Operations 1,538.75

60 Acre Parcel—Rotary Mud Deposits..... 1,106.70

—Farming Operations 620.00

Real Estate Sales..... 13,250.00

Refund of Street Improvement Bond Interest..... 29.25

Refund of Taxes..... 2.88

Sale of Leaf Mold..... 12.00

Deposits on Sales of Real Estate..... 950.00

Sale of Tract Office Building..... 75.00

Total Receipts 20,872.83

Total Balance Forward and Receipts..... \$22,533.96

Disbursements

Telephone—Office and Verdugo Woodlands.....	430.11	
Water, Electricity & Gas—		
Verdugo Park and Adobe.....	78.80	
Property Upkeep Expense—		
Park—Labor	1,236.59	
—Supplies	167.18	
Ranch—Expense	93.77	
Lot Clean-up—Labor	89.82	
—Supplies	1.04	
House—2866 Canada Blvd.—Labor.....	22.95	
—Supplies79	
—Sewer	64.40	
—118. W. Windsor Road—Labor.....	17.50	
—Supplies	28.66	
Lot 4, Verdugo Estate—Labor.....	12.25	
Office Expense—Supplies, Stamps, etc.....	103.27	
Rent—Office—1/1/39 - 5/1/39.....	320.00	
Advertising—Verdugo Woodlands Lots for Sale	883.92	
Pay-roll—Bookkeeper—12/17/38 - 9/30/39.....	1,556.79	
Footings Forward	\$ 5,107.84	\$22,533.96

[135]

Footings Forward From Previous Page..... \$22,533.96

Disbursements (continued)

Footings forward from previous page.....	\$ 5,107.84
F. P. Newport—Services—1/21/39 - 10/31/39.....	2,289.39
—Automobile mileage for inspection of properties	820.00
Taxes—Lots	71.53
—Franchise Tax	53.60
—Social Security Tax.....	78.56
Waterfront Rental Adjustment.....	400.00
Insurance—2866 Canada Boulevard.....	22.50
Printing Brief—McAdoo-Neblett Case.....	61.18
Re-zoning Property Expense.....	45.00
Trustees Bond	40.00
Stenographic Expense	29.11

Title Expense—Sale of Real Estate.....	178.10	
Releases—Real Estate—Bank Trust.....	10,700.00	
Commissions on Sale of Real Estate.....	922.50	
Referee's Indemnity Fees, Court Expenses and Filing Fees	385.53	
Court Reporter	17.50	
Appraisal Fees	74.00	
Notary Fees	9.50	
Filing Costs	106.00	
		<hr/>
Total Disbursements	21,411.84	
		<hr/>
Balance on Hand September 30, 1939.....	\$ 1,122.12	
		<hr/> <hr/>
		[136]

EXHIBIT B

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

SPECIAL OIL ACCOUNT

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES

December 22, 1938, to September 30, 1939, Inclusive

Cash Balance Forward From Report December 21, 1938.....	\$ 26,808.37
Receipts	
Royalties Received	160,527.11
	<hr/>
Total Balance Forward and Receipts.....	\$187,335.48

Disbursements

Taxes—Second half 1938-39 on real property	\$ 9,860.71
—State Oil and Gas Assessment.....	141.66

Security-First National Bank

Apply on—Interest	\$ 35,805.37
—Advances	2,527.89
—Int. on Advances ...	13.31
—Bank fees—for executing documents	81.50
—Principal	138,208.17

176,636.24

Street Improvement Bonds—Principal.....	5.41
—Interest	1.69

Total Disbursements 186,645.71

Balance on Hand September 30, 1939..... \$ 689.77

[137]

EXHIBIT C

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF RECEIPTS AND DISBURSEMENTS

THROUGH SECURITY-FIRST NATIONAL BANK TRUST D-7224

December 22, 1938, to September 30, 1939, Inclusive

Receipts

Oil Royalties on Harbor Lots.....	\$ 792.83
Collections on Contracts Receivable for Sale of Real Estate	
Principal	70.25
Interest	4.75
	<hr/>
Total Receipts	\$ 867.83

Disbursementts

Oilfield Testing & Engineering Co., Inc.....	3,330.00
	<hr/>
Excess Disbursements Over Receipts—Added to	
Amount Due to Bank in Trust.....	<u><u>\$2,462.17</u></u>

Note: This is not a cash balance but is a total amount advanced by the Bank in excess of receipts from sundry sources during the period covered by this report and has been added to the amount of principal due the Bank.

[138]

EXHIBIT D

H. F. METCALF

Trustee in Bankruptcy

F. P. Newport Corporation, Ltd., Bankrupt

STATEMENT OF IMPOUNDED ROYALTY FUNDS

BANK OF AMERICA—FOURTH AND PINE AVENUE—

LONG BEACH

December 22, 1938, to September 30, 1939, Inclusive

Receipts

Deposited by Universal Consolidated Oil Company, as per Agreement with City of Long Beach, for pro-rata production of oil, gas and sundry products, from oil lease of portion of Rancho Los Cerritos, known as Lots 18, 20 and 21, Recorder's Filed Maps, #365, for Assessment purposes only.

Balance reported to December 21, 1938.....	\$ 8,994.23
Deposited December 22, 1938 to September 30, 1939.....	62,364.96

Total on Deposit September 30, 1939.....	<u>\$71,359.19</u>
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Of this amount, provided it is determined that the City of Long Beach has no interest in the aforementioned property, there will be delivered to the Trustee, less deductions for any expense properly chargeable to the Trustee, as follows:

Balance reported to December 21, 1938.....	\$ 7,051.28
Pro-rata December 22, 1938 to September 30, 1939.....	49,919.82

Total Pro-Rata of Deposit Allocable to Trustee.....	<u>\$56,971.10</u>
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(Verified)

[Endorsed]: Filed Oct 31 1939 Ernest R. Utley,
Referee. Filed Nov 28 1941. R. S. Zimmerman,
Clerk [139]

[Title of District Court and Cause.]

PETITION FOR AUTHORIZATION, APPROVAL AND CONFIRMATION OF AN OIL AND GAS LEASE, AND FOR ORDER TO SHOW CAUSE.

To the Honorable District Court of the United States, Southern District of California, Central Division:

The petition of H. F. Metcalf, Trustee in Bankruptcy of the above entitled bankrupt, Security-First National Bank of Los Angeles, a national banking association, and F. P. Newport Corporation, Ltd., Bankrupt, respectfully represents unto the Court:

1. That H. F. Metcalf is, and at all times mentioned herein has been, the duly elected and approved and qualified Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt.

2. That Security-First National Bank of Los Angeles is, and at all times herein mentioned has been, a national banking association, duly organized and existing under and by virtue of the laws of the United States of America.

3. That F. P. Newport Corporation, Ltd. is, and at all times herein mentioned has been, a corporation.

4. That among the assets of said estate coming into the possession of H. F. Metcalf, as such Trustee, are those certain lots, pieces or parcels of real property in the Rancho Los Cerritos, situate in the

City of Long Beach, County of Los Angeles, State of California, more particularly described as follows:

Parcel 1: Beginning at the most Southwesterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577 Page 105 of Deeds, Records of said County, in the Northwesterly line of [140] Channel No. 3, Long Beach Harbor; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 250 feet; thence North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 250 feet to the most Northwesterly corner of the land described in said deed to the Title Insurance and Trust Company; thence along the Northwesterly line of said land so described, South $19^{\circ} 42' 30''$ West 738.08 feet to the point of beginning.

Parcel 2: Beginning at the most Southeasterly corner of the land described in the above mentioned deed to the Title Insurance and Trust Company, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the Southeasterly line of the land described in said deed North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 500 feet; thence South $19^{\circ} 42' 30''$ West 738.08 feet to a point in said Northwesterly line of Channel No. 3; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 500 feet to the point of beginning.

Note: In Book 1 Page 10 of the County Recorder's Assessment Maps, is the record of a map filed February 9th, 1917, made by the City Engineer of the City of Long Beach for local assessment purposes only, upon which map the above described property is designated as Lots 18, 20 and 21.

Subject to any valid municipal, state and/or federal rights, if any there be, and to conditions, reservations, restrictions, rights and rights of way, if any there be, of record.

5. That Security-First National Bank of Los Angeles, as trustee under a declaration of trust, holds the legal title to said real property as security for an indebtedness in excess of one million dollars owing to it by the bankrupt, said indebtedness being more particularly described in the exhibit attached to the petition of H. F. Metcalf, Trustee in Bankruptcy herein, for an order authorizing him to approve an agreement with Security-First National Bank of Los Angeles and others on file herein, reference to which said exhibit is hereby made for further particulars.

6. That the said real property is located in what is commonly known as the Wilmington-Long Beach oil field, which for some time past has been the scene of intensive oil development. That said real property fronts on what is known as "Channel No. 3" of Long Beach Harbor and consists of two parcels as hereinbefore set forth. That one of said

parcels has a frontage of approximately 250 feet on said "Channel No. 3" and the other parcel has a frontage of approximately [141] 500 feet on said "Channel No. 3."

7. That three distinct oil and gas zones have been discovered in said Wilmington-Long Beach oil field, namely what are commonly known as the "Ranger" zone, the "Terminal" zone, and the "Ford" zone. That the above described real property is now considered proven oil and gas bearing property by reason of the discovery of oil and gas in wells drilled upon other property in the vicinity thereof; that said property is more valuable at the present time for the development and production of oil and gas than for any other purpose, and if not immediately developed, any oil and gas contained therein will to a great extent be drained therefrom by wells drilled or to be drilled on adjacent property.

8. That on account of the proximity of other wells drilled or now drilling close to said real property, it is vitally necessary for the preservation of said estate that your petitioners now enter into a lease with a responsible oil producer for the development and production of the oil and gas believed to underlie said property.

9. That, subject to the authorization, approval and confirmation thereof by this Court, petitioners have entered into a lease with Universal Consolidated Oil Company, a California corporation, a copy of which said lease is attached hereto, marked Exhibit "A" and made a part hereof, the same as if here copied in full.

10. That said lease provides, among other things, for the payment of a bonus of \$25,000.00 payable out of ten per cent (10%) of the gross production first obtained from said real property, and thirty-five per cent (35%) royalty, all as will more fully and accurately appear by the terms of said Exhibit "A", to which reference is hereby made for further particulars.

11. That in addition to the above, said Universal Consolidated Oil Company has agreed to pay and has placed in escrow with Title Guarantee and Trust Company, of Los Angeles, California, [142] the sum of \$25,000.00 as a cash bonus for said lease, which sum is to be paid to said H. F. Metcalf, as Trustee in Bankruptcy herein, subject to the authorization, approval and confirmation of said lease by this Court. That a copy of the escrow instructions accompanying the said deposit of \$25,000.00 are attached hereto, marked Exhibit "B" and made a part hereof, the same as if here copied in full.

12. That your petitioners have made a thorough investigation of said Universal Consolidated Oil Company and they are, and each of them is, satisfied that said Universal Consolidated Oil Company is well able, both from the standpoint of financial ability and practical experience, to carry out the terms of said lease and said escrow. That your petitioners are further satisfied with the reputation of the officers of said Universal Consolidated Oil Company for honesty and integrity.

13. That your petitioners allege that it now appears to be for the best interests of said estate and its creditors and of said bankrupt that said lease be authorized, approved and confirmed by the Court, and that your petitioners be authorized and directed to do all things necessary or proper to be done to carry the same into effect.

14. That your petitioners believe and therefore state that it would not be for the best interests of said estate, its creditors or the bankrupt, to have said lease awarded to the highest bidder at public auction, but that it would be for the best interests of said estate, its creditors, and the bankrupt, to permit any operator who may desire to enter into a lease of said premises on the same form as said Exhibit "A", (exclusive of royalty, bonuses, name of the lessee, and its address), to come into Court and present upon the hearing of this petition any offer in excess of that contained herein and in said Exhibit "A", and at the same time to present to the Court appropriate written evidence of the financial and moral [143] responsibility and practical experience of such operator, in order that said Court may then determine whether said lease should be made to said proposed lessee named therein or to some other operator who may have made a bid therefor.

Wherefore, petitioners pray:

1. That a day may be set for the hearing of this petition;

2. That notice of the time and place of the hearing of this petition be given according to law;

3. That an order to show cause issue requiring all creditors of this estate and all other interested parties to be and appear before this Court at the time set for the hearing of this petition, then and there to show cause if any they have why an order should not be made and entered herein granting this petition and authorizing, approving and confirming the execution of said lease, or some other similar lease which the Court may see fit to authorize;

4. That upon the hearing of this petition and said order to show cause, this Court make and enter its order authorizing, approving and confirming the execution of said lease, or some other similar lease which the Court may see fit to authorize, and authorizing and directing your petitioners to do all things necessary or proper to be done to carry such lease into effect; and

5. For such other and further affirmative equitable relief as may be proper in the premises.

H. F. METCALF

Trustee in Bankruptcy herein.

BAILIE, TURNER & LAKE

By NORMAN A. BAILIE

Counsel for said Trustee in
Bankruptcy

(Seal) SECURITY-FIRST NATIONAL
 BANK OF LOS ANGELES

By J. E. HATCH
 Vice-President

By R. T. ADAMS
 Asst. Secretary
 W. C. SHELTON,

O. K. W. C. S.

GEO. W. BURCH, Jr. and
EARL MOSS

By W. C. SHELTON
 Counsel for said Security-First
 National Bank of Los Angeles

(Seal) F. P. NEWPORT
 CORPORATION, LTD.

By F. P. NEWPORT
 President

By J. B. GRIBBLE
 Secretary

L. M. CAHILL
 Counsel for F. P. Newport Cor-
 poration, Ltd. [144]

United States of America
Southern District of California
Central Division
County of Los Angeles—ss.

H. F. Metcalf, being duly sworn, says: That he is one of the petitioners and the Trustee in Bankruptcy in the foregoing entitled proceeding; that he

has read the foregoing Petition for Authorization, Approval, and Confirmation of an Oil and Gas Lease, and for an Order to Show Cause, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

H. F. METCALF

Subscribed and sworn to before me this 14th day of January, 1938.

(Seal)

FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles,
State of California. [145]

United States of America
Southern District of California
Central Division
County of Los Angeles—ss.

R. T. Adams being duly sworn, says: That he is an officer, to wit Ass't Secty. of Security-First National Bank of Los Angeles, a national banking association, one of the petitioners in the foregoing entitled proceeding; that he has read the foregoing Petition for Authorization, Approval, and Confirmation of an Oil and Gas Lease, and for an Order to Show Cause, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated

on his information or belief, and as to those matters that he believes it to be true.

R. T. ADAMS

Subscribed and sworn to before me this 14th day of January, 1938.

(Seal) FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles,
State of California. [146]

United States of America
Southern District of California
Central Division
County of Los Angeles—ss.

F. P. Newport, being duly sworn, says: That he is an officer, to wit President of F. P. Newport Corporation, Ltd., a corporation, the Bankrupt in the foregoing entitled proceeding; that he has read the foregoing Petition for Authorization, Approval, and Confirmation of an Oil and Gas Lease, and for an Order to Show Cause, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

F. P. NEWPORT

Subscribed and sworn to before me this 14th day of January, 1938.

(Seal) FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles,
State of California. [147]

EXHIBIT "A"

OIL AND GAS LEASE.

This indenture, Made and entered into this 14th day of January, 1938, by and between Security-First National Bank of Los Angeles, a national banking association, as Trustee under its Trust No. D-7224, F. P. Newport Corporation, Ltd., a corporation, Bankrupt, and the Trustee in Bankruptcy of said F. P. Newport Corporation, Ltd., Bankrupt, Parties of the First Part and Lessors, and Universal Consolidated Oil Company, a California corporation, Party of the Second Part and Lessee,

Witnesseth:

Granting Clause.

That for and in consideration of \$10.00, lawful money of the United States of America, to the Lessors in hand paid, and of other valuable consideration, the receipt of which is hereby acknowledged, and in consideration of the covenants and agreements hereinafter contained by the Lessee to be kept and performed, the Lessors have leased, let and demised, and by these presents do lease, let and demise unto the Lessee, its successors and assigns, those certain lots, pieces or parcels of real property in the Rancho Los Cerritos, situate in the City of Long Beach, County of Los Angeles, State of California, more particularly described as follows:

Parcel 1: Beginning at the most Southwesterly corner of the land described in the

deed to the Title Insurance and Trust Company, recorded in Book 5577 Page 105 of Deeds, Records of said County, in the Northwesterly line of Channel No. 3, Long Beach Harbor; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 250 feet; thence North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 250 feet to the most Northwesterly corner of the land described in said deed to the Title Insurance and Trust Company; thence along the Northwesterly line of said land so described, South $19^{\circ} 42' 30''$ West 738.08 feet to the point of beginning. [148]

Parcel 2. Beginning at the most Southeasterly corner of the land described in the above mentioned deed to the Title Insurance and Trust Company, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the Southeasterly line of the land described in said deed North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 500 feet; thence South $19^{\circ} 42' 30''$ West 738.08 feet to a point in said Northwesterly line of Channel No. 3; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 500 feet to the point of beginning.

Note: In Book 1 Page 10 of the County Recorder's Assessment Maps, is the record of a map filed February 9th, 1917, made by the City Engineer of the City of Long Beach for local assessment purposes only, upon which map

the above described property is designated as Lots 18, 20 and 21.

To have and to hold the same for the purposes and term hereinafter provided therefor, subject to any valid Municipal, State and/or Federal rights, if any there be, and subject also to conditions, reservations, restrictions, rights and rights of way, if any there be, of record, and upon the following covenants, terms and conditions:

Duration of Lease.

1. Unless sooner terminated as elsewhere herein provided, this lease shall continue for a period of 30 days from and after the date of the delivery hereof, and so long thereafter as actual drilling on said premises is being diligently conducted or deferred under provisions herein elsewhere contained, and should production of one or more of the products specifically mentioned in the next succeeding paragraph result from said drilling operations, then this lease, unless sooner terminated as elsewhere herein provided, shall remain in full force so long thereafter as one or more of said products are produced from said demised premises in commercially paying quantities, not to exceed 25 years from date hereof.

Purpose of Lease and Rights of Lessee.

2. The Lessee shall have the sole and exclusive right, (unless otherwise expressly provided herein to the contrary), of prospecting the demised premises and drilling for, producing, [149] extracting, treating, removing and

marketing oil, gas, natural gasoline and other hydrocarbon substances therefrom, and to establish and maintain on said premises such tanks, boilers, houses, engines and other apparatus and equipment, power lines, pipe lines, roads and other appurtenances as may be necessary or convenient in the production, treatment, storage and/or transportation of any and all said products from and on said property. The Lessee shall have the right during the life of this lease to drill for and develop such water on any part of the demised premises as it may require in its operations hereunder, provided the Lessors possess the right so to do; provided, however, that it is understood by the Lessee that a portion of said demised premises is now being occupied by John Harvey, doing business under the firm name and style of De Luxe Water Taxi Co., under one or more leases, which said lease or leases, held by said John Harvey, the Lessors shall be under no obligation to terminate until such time as the Lessee has drilled and completed at least one well on said property which produces oil and/or gas in commercially paying quantities, and until such occupancy by the said John Harvey, his successors in interest or assigns, shall substantially interfere with the operations of the Lessee hereunder. It is further understood by the Lessee and the Lessors warrant that the portions of said premises so held by said John Harvey are by him held under a month to month lease or leases, which are subject to termination upon the notice provided by law therefor.

Drilling Requirements.

3. The Lessee agrees to commence the actual drilling of a well on the demised premises within 30 days after date of the delivery hereof, and to diligently prosecute the same until oil and/or gas be found in commercially paying quantities, or to a depth at which further drilling would, in the opinion of a competent [150] and impartial geologist, be unprofitable; provided, however, that the Lessee shall drill said first well to and so far into the "terminal" sand, zone or horizon as may reasonably be expected to secure therefrom the most prolific production of oil. If said first well or any subsequent well prior to completion of a paying well be abandoned for mechanical or other reasons, this lease shall remain in force and effect if the actual drilling of a new well is begun within 30 days from the date of such abandonment, and the drilling thereof is diligently prosecuted to completion or abandonment. If prior to the completion of said first well there shall have been completed within 330 feet of the exterior boundary line of any of the demised premises a well which produces oil and/or gas in commercially paying quantities, then and in such event the Lessee agrees to promptly commence the drilling of a second well and to diligently prosecute the drilling thereof concurrently with the drilling of said first well, until such second well shall have been completed as a commercial producer or until it shall have been drilled to a depth at which further drilling would, in the opinion of a compe-

tent and impartial geologist, be unprofitable. If at the time of the abandonment of any well the Lessee is already engaged in the drilling of one or more other wells upon the demised premises, the foregoing requirement for the commencement of a new well within 30 days after the date of such abandonment shall not apply so long as the drilling of any such additional well or wells shall be in good faith diligently continued.

Subsequent Wells.

It is further understood and agreed that subject to any rules and regulations of any Federal, State, Municipal or other governmental agency or other matters or conditions beyond the control of the Lessee, one well shall be drilled to completion and production for each one acre of land covered hereby as follows: [151] Such wells, (unless the Lessee shall elect or be required hereunder to accelerate its drilling operations), shall be drilled in succession; the drilling of each successive well shall be commenced at an interval of not more than 30 days after the next preceding well has been completed and placed on production. Such drilling of said wells shall continue until a number equal to one well for each acre of land covered hereby has been drilled and completed as a commercial producer.

Full Development Clause.

Unless excused from so doing under Paragraph 5 hereof, (anything herein elsewhere to the contrary notwithstanding), the Lessee agrees, while operat-

ing hereunder, to properly produce all available oil, gas and other hydrocarbon substances from the demised premises, (or any portion thereof held by the Lessee), and to properly exploit, develop and protect the minerals and mineral rights in the demised premises, (or in any portion thereof held by the Lessee), subject, in each instance, to legal restrictions and to any regulations imposed by governmental authority or any other matters over which the Lessee has no control. For a failure of the Lessee, when reasonably necessary and proper so to do, to develop any known commercially profitable zone or stratum the Lessors may forfeit the right of the Lessee to develop or produce any such zone or stratum or any zone or stratum below any depth from which the Lessee may then be producing on said pemises, or the Lessors may pursue any other remedy given them by law hereunder.

No Slant Drilling.

The Lessee also agrees to drill all wells within an area representing the superficial area of the demised premises from the surface thereof down to the depth of said wells, and not to trespass upon the lands of adjoining or neighboring owners, and to make the necessary surveys to carry out the provisions of this clause, which surveys shall be open to the inspection of the [152] Lessors and their authorized representatives; and the Lessee agrees to indemnify and protect the Lessors and each of them against any and all claims and refunds for all oil, gas and other hydrocarbon substances se-

cured and produced from any well drilled hereunder not extending down wholly beneath said superficial area.

Limitation on Rights to Deepen, etc.

4. The Lessee shall have the right at all times during the continuance of this lease to operate, deepen, (if the right to deepen has not been forfeited), redrill and maintain all producing oil and/or gas wells upon the demised premises; provided, however, that the Lessee shall not, without the written consent of the Lessors, have the right to deepen any existing well or to drill any new well after a forfeiture has occurred because of the failure of the Lessee to fulfill any of the drilling obligations hereunder, but this proviso shall apply only to property affected by such forfeiture and to the wells thereon situate or intended to be drilled thereon.

Suspension of Operations.

5. Drilling and/or producing and/or repairing operations may be delayed, suspended or curtailed on the demised premises only in the event that they are prevented by the elements, accidents, strikes, lockouts, delays in transportation or interference by Municipal, County, State or Federal action, or the action of other governmental officers or bodies or other causes beyond the reasonable control of the Lessee, or when there is no market for the oil; provided, however, that the failure of the Lessee to obtain any permit or permits legally required

as a condition precedent to the drilling of any such well or wells shall not operate to delay, suspend or curtail any such operation where the failure to obtain any such permit is the result of the neglect of the Lessee to in good faith promptly apply therefor, or where any refusal to grant such a permit is based upon any prior acts [153] or omissions of the Lessee; and, provided, further, that in no event shall any failure, from whatever source, to obtain any such necessary permit or permits extend the time for the commencement of the actual drilling of the first well beyond 120 days from the date hereof.

Conservation Agreements.

The Lessee, if and when legally required so to do, is hereby authorized to enter into conservation and curtailment agreements with other operators for the purpose of preventing waste or for the conservation of oil and/or gas; provided that any such legally required agreed curtailment, unless otherwise provided by law, shall be at no greater pro rata percentage per well or location on demised premises than that on offset acreage where offset wells are producing or drilling; provided, further, however, that no such legally required agreement, unless provision therefor be made mandatory by law, shall require or permit the Lessee to suspend or curtail any drilling or production operations on any well which offsets any well on adjacent premises drilled or being drilled within 330 feet of the boundary line of the demised premises, where the drilling

or production of the well so offset is not likewise being suspended or curtailed.

Free Use of Fuel and Water.

6. The Lessee shall be entitled to use, without payment of royalty, so much of the water, (if the right to develop and produce water be available to the Lessee hereunder), oil and/or gas developed and produced by the Lessee on the demised premises, as may be required by the Lessee in the operation of said premises.

Royalty on Oil.

7. The Lessee shall pay said Trustee in Bankruptcy, his successors or assigns, on or before the 20th day of each month, as royalty and rental, a sum equal to thirty-five per cent (35%) of the full market price on the demised premises of all oil produced and saved by it from said premises during the last preceding [154] calendar month, or (as hereinafter provided) in lieu thereof, thirty-five per cent (35%) of the oil so produced and saved. Said market price shall be the full market price contracted for by the Lessee and shall not be less than the available posted market price offered by the major oil purchasing companies for oil of like gravity and quality on the premises where produced in the district in which the demised premises are located on the date of delivery of the oil from the Lessee's gauge tanks, unless clean oil be unsaleable at such price, in which event the Lessee shall so notify Lessors of such condition, and pending the

continuance of such condition, the Lessee shall sell such clean oil at the best available price obtainable therefor, unless the Lessors elect to take in kind, and the price contracted therefor by the Lessee shall be the price used in settlement with the Lessors on account of the oil so marketed.

Dehydration.

In the event the oil requires treatment or dehydration to render it marketable as clean oil, the Lessee shall so treat or dehydrate the same or cause the same to be treated or dehydrated, and the Lessee is hereby authorized to deduct from the amount due the Lessors a sum equal to thirty-five per cent (35%) of the actual cost of transportation to or from the treating plant, if same be located off of the demised premises, and thirty-five per cent (35%) of the actual cost of such treating or dehydrating, exclusive of any plant or overhead cost, not to exceed four cents per barrel for such treating and/or dehydrating.

Royalty in Kind.

At Lessors' option, exercised not oftener than four times in any one calendar year, upon thirty days' previous written notice, Lessee shall, until notified in writing to the contrary, deliver into Lessors' tanks on the demised premises, free of cost, Lessors' royalty oil. No royalty shall be due the Lessors for [155] or on account of any oil lost through evaporation, leakage or otherwise, not due to the negligence of the Lessee, prior to the

marketing of the same or delivery to the Lessors, if royalty oil is being taken in kind.

Royalty on Gas.

8. The Lessee shall be under no obligation to sell or store gas or water, nor to manufacture gasoline or other products from natural gas; provided, however, that if the Lessee can contract the manufacture of gasoline and/or other products from natural gas on a commercially profitable basis, the Lessee will be required so to do, unless the Lessee elects to manufacture the same itself. If any gas or any water is sold, the Lessee shall pay to the said Trustee in Bankruptcy, his successors or assigns, a sum equal to thirty-five per cent (35%) of the proceeds of the sale of such gas or water, after deducting any actual cost (exclusive of overhead) of transporting and selling the same. If casinghead gasoline or other products be manufactured or extracted on the premises or elsewhere by the Lessee or by others under a contract or lease on a royalty basis from gas produced from any well or wells on the demised premises, such products shall be marketed according to the prevailing usage and custom of marketing such products and at the best price obtainable therefor consistent with sound business principles, and the Lessee shall deduct from the gross royalty or proceeds received by the Lessee from the sale of such products any actual cost (exclusive of overhead) to the Lessee of extracting, (if it extract such products), transporting and selling the same, and shall pay to the said Trustee

in Bankruptcy, his successors or assigns, a sum equal to thirty-five per cent (35%) of the remainder of such royalty or proceeds.

Taxes on Personalty.

9. The Lessee shall well and truly pay before delinquency all taxes and assessments levied or assessed against the [156] improvements, machinery, equipment or other property, real or personal, placed or caused to be placed by it upon the demised premises, including all oil stored thereon, exclusive of Lessors' royalty oil.

Other Taxes.

If the assessed value of the demised premises, (exclusive of the improvements thereon), be hereafter increased over the assessed valuation as fixed for the fiscal year 1936-37, by reason of the discovery of oil and/or gas thereon, the Lessee shall pay sixty-five per cent (65%) of all taxes levied or assessed upon such increase above the assessed valuation for said fiscal year 1936-37, and the Lessors shall pay the balance of the taxes and/or assessments on said lands; provided, however, that if under the present laws or any laws which may be hereafter enacted, this lease and/or the leasehold estate created hereby and/or the oil, gas, minerals or mineral rights in said premises are assessed separately and apart from said land, under any name or designation whatsoever, and/or if any tax be levied or assessed which is based upon the quantity of the production of oil and/or gas from said prem-

ises, whether assessed or levied to or against the Lessors or Lessee, or if any severance charge be levied, assessed or made, then sixty-five per cent (65%) of the charges and/or taxes so levied, assessed or made shall be paid by the Lessee and thirty-five per cent (35%) thereof shall be paid by the Lessors.

Failure of Lessors to Pay Taxes.

Upon the failure of the Lessors to pay their proportion of any of said taxes, the Lessee is hereby authorized to pay the same, and the Lessors agree to repay the Lessee the amount so paid, with interest thereon at the rate of 7% per annum from the date of such payment, by the Lessee until so repaid.

Rights if Lessee Pays Lessors' Taxes.

In case of any such payment by the Lessee it may deliver to the Lessors an itemized statement of all taxes so paid [157] for the Lessors, in which event said Lessee may deduct from the next royalty or royalties payable hereunder an amount sufficient to reimburse the Lessee for the amount so paid.

Rights if Lessors Pay Lessee's Taxes.

Upon the failure of the Lessee to pay its proportion of said taxes, the Lessors or any one or more of them may advance the same, and the Lessee agrees to repay same to the Lessor or Lessors so making said advancement, together with interest

thereon at the rate of 7% per annum from the date of such advancement until repaid.

The obligations of the Lessors under this Paragraph 9 shall not be binding upon any trustee lessor except to the extent that such trustee lessor may have in his possession monies sufficient to meet such obligations which may be available for that purpose, nor shall any such obligations be binding upon any such trustee lessor in his or its individual capacity.

Royalty, Where and How Paid.

10. All payments of rentals and royalties due hereunder shall be made by the Lessee's check, accompanied by a statement showing in detail how the amount was arrived at, mailed, postage prepaid, or delivered personally on or before the day such payment is due, to said Trustee in Bankruptcy at the address of such Trustee, at Los Angeles, California, until further notified by said Trustee in Bankruptcy. No change in the ownership of said demised premises or in any part thereof or in the rentals or royalties or any part thereof shall affect or bind the Lessee until the purchaser thereof shall exhibit to the Lessee the original instrument of conveyance and furnish to the Lessee a duly certified copy thereof. Such evidence of ownership must be supplied at least thirty days before the same is to take effect, (unless otherwise consented to by the Lessee), otherwise payment of rentals to

the purchaser's predecessor in title shall bind such purchaser. [158]

Paying Quantities.

11. The term "paying quantities" and similar expressions wherever used herein are hereby defined to mean such quantities of oil and/or gas as will justify the Lessee in continuing to operate the well or wells from which the same may be produced.

Manner of Operations and Records Thereof.

12. The Lessee shall carry on all operations hereunder diligently, with adequate equipment, and in a careful workmanlike manner, and in accordance with all valid laws, rules and regulations enacted by any authority having jurisdiction over such operations, and shall keep full and true records of the operations and productions, sales and shipments of products from said property and all other records necessary and proper to enable it to, (and it shall), fully and properly account hereunder, and all such records and the operations on said demised premises shall be at all reasonable times open to the inspection of the Lessors or any one or more of them, (including all information filed with the State Oil and Gas Supervisor by the Lessee, its successors or assigns, consent to the inspection of which is hereby expressly granted by the Lessee). Whenever requested by the Lessors or by any one or more of them in writing, the Lessee

shall furnish to them a copy of the log of any well drilled on said demised premises.

Basis of Accounting by Lessee.

All accountings by the Lessee to the Lessors for royalty and rental from oil produced hereunder shall be based upon tests made of the oil after it has been cleaned and dehydrated, and which tests must be some approved modern method commonly in use at the time the tests, respectively, are made, and which said tests and the manner of making the same must be such as to obtain the most accurate results reasonably obtainable, and it shall be the duty of the Lessee in marketing such oil to observe and enforce these requirements; and, in contracting for the [159] processing of natural gas, it shall be the duty of the Lessee to see that it gets a like or greater percentage of other products (or of the proceeds therefrom) extracted and saved from the natural gas as it does of the gasoline (or of the proceeds therefrom) extracted and saved from the natural gas.

Use of Premises by Lessors.

13. The Lessors and each of them shall have the right to gauge all production hereunder and to use the surface of the demised premises, (where they have the right now to use the same, respectively), for any purpose or purposes not inconsistent with the rights of the Lessee hereunder, and to such an extent as will not unreasonably interfere with such rights of the Lessee hereunder, including the right

to develop or to cause to be developed any sand or zone in the demised premises, the right to develop which has been lost by the Lessee. The Lessee agrees to conduct its operations hereunder so as to interfere as little with such use by the Lessors, respectively, as is consistent with the economical operation of the property for the development and production of oil, gas and other hydrocarbon substances therefrom and thereon.

Removal of Equipment.

14. The Lessee shall have, within the time elsewhere herein provided therefor, the right to remove any houses, tanks, pipe lines, structures, casing or other equipment, appurtenances or appliances of any kind brought by it upon the said demised premises, whether affixed to the soil or not; provided, however, that in case of the abandonment, for reasons other than mechanical difficulties, of any producing oil and/or gas or water well in which the Lessee has landed casing, if the owner or owners of the demised premises on which any such well shall be located shall desire to retain the same, he or they shall notify the Lessee in writing to that effect within ten days after receiving written notice from the Lessee of its intention to abandon and remove [160] casing, and thereupon the Lessee shall leave in the well such of said casing as any such owner or owners shall require, and such owner or owners shall forthwith pay to the Lessee fifty per cent. of the cost to the Lessee of such casing delivered on the ground.

Forfeiture.

15. In the event of any breach of any of the covenants, terms or conditions of this lease by the Lessee, other than one of those mentioned in Paragraph 29 hereof, and the failure of the Lessee to commence in good faith to remedy the same within 30 days after written notice from the owner or owners of the demised premises so to do, or if the Lessee shall fail to diligently prosecute its efforts until such default has been fully remedied, then, at the option of such owner or owners, this lease shall forthwith cease and determine, and all rights of the Lessee herein and hereunder shall be at an end; provided, however, that notwithstanding any such forfeiture of this lease for any cause other than one of those mentioned in subparagraphs (a) and (b) of Paragraph 29 hereof the Lessee shall have the right to retain any and all wells then being drilled or which may then be producing oil and/or gas in paying quantities, together with the afore-said easements and appurtenances of said wells, in so far as reasonably necessary for the operation thereof, and sufficient land surrounding each well for the operation thereof. The land so retained shall be subject to all of the terms and conditions of this lease.

Litigation as to Royalty—Delinquent Liens.

16. Should suit be brought involving the ownership of any royalties accruing hereunder or the validity of this lease or the foreclosure of a lien

or charge against the fee of any lot, piece or parcel of land included in the demised premises, or said rents and royalties, the Lessee shall not be relieved of the obligation to make any such payment of rents and royalties, but such payments shall be made to a bank to be selected by the Lessors, [161] their successors in interest or assigns; and as to the amount in controversy only, shall be held in escrow by such bank pending the determination of such suit, and shall upon the final determination thereof be paid over to the party or parties who shall be determined to be entitled thereto.

Rezoning and Permits.

17. That as to all or any part of the lands covered by and subject to the terms of this lease which may at the date hereof or which may hereafter require a permit or zoning to permit any authorized operation of the Lessee hereunder, the Lessors of the lands so requiring such permit or rezoning and the Lessee agree, but without expense to the Lessors, to sign and to cause to be delivered to the legally constituted authorities of the proper Municipal or other political subdivision the necessary petitions, documents, maps and/or other requisite papers requesting, soliciting and praying for such permit or the rezoning of such lands so as to permit such operations thereon; provided, however, that nothing herein contained shall obligate the Lessors or any one or more of them to sign any petition, document, map or other paper where the signing thereof would

have the effect of obligating such signer to pay any money or moneys or to perform any other act which might affect such signer financially, or which might operate as a transfer or relinquishment of any right or interest of such signer hereunder, or as a transfer or conveyance of any interest of such signer in said property or in any products therefrom.

Lessee Liable for Damages and Negligence.

18. The Lessee shall during the term of this lease be responsible to the Lessors, respectively, and to all other persons or corporations for all damages caused by its negligence and/or by its operations hereunder, and shall indemnify and defend the Lessors and each of them against any and all such damages or claim [162] therefor on the part of third persons; and, if the Lessee shall engage in any operation or operations hereunder which may have the effect of placing a legal liability upon the Lessors, the Lessee shall, at its own cost and expense, take out and maintain all insurance reasonably necessary to protect and indemnify the Lessors and each of them hereunder, and shall furnish to the Lessors appropriate evidence that the Lessee has complied with the requirement to take out and maintain such insurance.

Notices.

19. Any notice from the Lessors or any of them to the Lessee may be given by serving such notice personally upon the Lessee or by sending the same by registered mail addressed to the Lessee at 417

South Hill Street, Los Angeles, California, and any notice from the Lessee to the Lessors or to any one or more of them may be given by sending the same by registered mail addressed to said Lessors at their respective places of business in the City of Los Angeles, California. Any party hereto may at any time by written notice to the others change the address to which notices shall thereafter be sent by the person or persons desiring to send such notice.

Lessee to Keep Premises Free of Liens.

20. All materials furnished or work done on said demised premises by the Lessee shall be at the Lessee's sole cost and expense, and the Lessee agrees to protect said demised premises and each piece and parcel thereof and the respective Lessors from all claims of contractors, laborers and materialmen, hereby consenting that the Lessors may post and keep posted on the demised premises such notices as may be desired in order to protect said lands and premises against mechanics' or other liens resulting from the operations of the Lessee hereunder.

Surrender of Premises.

21. Upon the expiration of this lease or its sooner termination in whole or in part, the Lessee shall surrender the [163] possession of the demised premises or the affected portion thereof to the Lessors, and shall deliver or cause to be delivered to the Lessors a good and sufficient reconveyance thereof. Within 30 days after such expiration or termina-

tion, the Lessee shall, (subject to the rights and privileges granted the Lessee and the Lessors, respectively, hereunder), remove from such premises as to which this lease is so terminated, all of its rigs, machinery and other property, and shall fill all sump holes and other excavations made by it.

Right to Quitclaim.

At any time after the Lessee has drilled the first or any subsequent well upon said demised premises to the depth required by Paragraph 3 hereof, if such well or wells be incapable of producing in paying quantities, the Lessee may quitclaim the demised premises, or the parcel thereof upon which such well may have been drilled to the Lessors, and thereafter the obligations of the Lessee hereunder shall cease as to the premises or parcel so quitclaimed; provided further, however, that the quitclaiming of either of said parcels without the other shall have the same effect and be accompanied by the same results as if the same had been forfeited under Paragraph 15 hereof, but the quitclaiming of the entire premises, whether accomplished by one or two deeds and whether accomplished at the same or different times, shall operate to deprive the Lessee of all of its rights hereunder, except the right to remove its equipment as provided in Paragraph 14 hereof, subject to the rights of the owner or owners as in said last mentioned paragraph set forth.

Arbitration by Geologists.

The geologist mentioned in said Paragraph 3 hereof shall be a geologist mutually agreed upon in

writing by the parties hereto. If they cannot so agree the Lessors shall select one geologist, the Lessee another, and if the two so selected cannot agree, they are to select a third, whose opinion, when [164] expressed in writing, shall be binding on all parties hereto.

Assignment.

22. It is agreed by and between all of the parties hereto that the Lessee shall have no right to (and it covenants that it will not), without the written consent of the Lessors first had and obtained, assign or transfer this lease or any interest therein or thereunder, nor sublet the demised premises or any part thereof; provided, however, that nothing in this paragraph contained shall operate to deprive the Lessee of the absolute right to assign or transfer this lease in its entirety in the event (a) that the Lessee consolidates with another corporation, or (b) in the event it reorganizes, or (c) in the event it makes a bonafide transfer of a majority of its assets; but any such assignment or transfer must conform to the requirements hereinafter in this paragraph contained. It is hereby further agreed that in the event this Lease shall be assigned by the Lessee with the consent of the Lessors as to a part or as to parts of the demised premises, and the assignee or assignees of such part or parts shall default in the performance of any covenant of this lease as applied to such portion so assigned, such default shall not operate to defeat or affect this lease in so far

as it covers the part of the demised premises retained by the said Lessee or any assignee thereof upon which there is no default. Any transfer or assignment of this lease or of any interest herein or hereunder or of the leasehold estate or any part thereof or of any interest therein, or the subleasing of said demised premises or of any part thereof, or any agreement for the joint development or operation of said demised premises or any part thereof, whether made by the Lessee or by anyone who may have succeeded to all or some of the rights of the Lessee hereunder, shall operate at the option of the Lessors to entitle the Lessors to terminate this lease and to re-enter the premises, unless such assignment, trans- [165] fer, sublease or agreement is in writing and contains (1) the full and correct name and residence address of the assignee, transferee, sublessee or joint operator, and (2) a covenant on the part of such assignee, transferee, sublessee or joint operator to the effect that such assignee, transferee, sublessee or joint operator is bound by all rights granted by the Lessee to the Lessors herein and assumes for the benefit of the Lessors and will faithfully keep, observe and perform each and every covenant, term and condition in this lease contained on the part of the Lessee in the future to be observed, kept or performed, in so far as the same may apply or relate to any interest, property or estate acquired by said assignee, transferee, sublessee or joint operator under any such assignment, transfer, sublease or agreement; and unless said in-

strument or a duplicate thereof be subscribed by said assignee, transferee, sublessee or joint operator and be duly acknowledged by him and certified so as to entitle the same to recordation, and be delivered to said Lessors in person or by United States registered mail in the manner herein required for the service of any notice upon the Lessors, within ten days next following the delivery of any such assignment, transfer, sublease or agreement. Such name, address, assumption and covenant may at the option of the assignee, transferee, sublessee or joint operator be contained in a separate instrument to be executed concurrently with such assignment, transfer, sublease or agreement, acknowledged, certified and delivered to said Lessors within the time and in the manner above provided. If such assignment, transfer, sublease or agreement shall pertain to only a portion of the leasehold estate or of an interest therein, as hereinbefore provided, any right of forfeiture under this provision shall pertain only to such portion. [166]

Release of Lessee in Case of Assignment.

In the event of the making of any such assignment, transfer or sublease, as herein provided for, and the delivery to the Lessors of the instrument containing such information and covenant, together with a copy of any other instrument or instruments by or through which any such assignment, transfer or sublease may have been accomplished, if the Lessors shall have approved in writing of the making

of such assignment, transfer or sublease, the Lessee shall thereupon be released and relieved of any obligation hereunder thereafter maturing, in so far as the same may relate or apply to any interest, property or estate acquired by such assignee, transferee or sublessee under any such assignment, transfer or sublease.

Successors and Assigns.

23. This lease and all of its terms, conditions, covenants and stipulations, unless otherwise provided herein, shall extend to and be binding upon the successors and assigns of the Lessee and upon the successors in interest and assigns of the respective Lessors.

Use of Water Front Property.

24. Lessee covenants not to construct upon the surface of the demised premises within 150 feet of said Channel No. 3 any building, tanks or other structures, and agrees not to occupy the surface of said premises within 150 feet of said Channel No. 3 for any purpose, and that it will at all times keep open and unobstructed on each of said parcels a right of way not less than twenty-four feet in width extending from the nearest public street to said 150 foot strip lying along said Channel No. 3, which said rights of way shall be at all times available to the said Lessors and to their respective licensees, successors in interest and assigns, for ingress to and egress from said respective strips of land; provided,

however, that the Lessee shall not be required to surface, pave or repair said rights of way, (unless such repair [167] be necessitated by its acts), nor shall it be liable for any injury which may result to any person while passing or attempting to pass over either of said rights of way and which may have been proximately caused by any defect in or disrepair of such right of way which it was not obligated to remedy or repair as aforesaid.

Bonus.

25. In consideration of the rights in this lease, granted to the Lessee, the Lessee agrees to pay to the Lessors (in addition to any cash bonus paid for this lease), a bonus of \$25,000.00, in addition to all royalties hereinabove provided for, payable out of ten per cent (10%) of the gross production first obtained from the demised premises.

Covenants Run With Land.

26. All covenants herein contained pertaining to the payment of rents and royalties shall be deemed to be covenants running with the land and shall be binding upon and shall inure to the benefit of the owner or owners of such lands until all of the rights of the Lessee hereunder are finally terminated.

Lessors Acquire No Additional Interest.

27. Anything elsewhere herein contained to the contrary notwithstanding, it is expressly understood and agreed by and between the Lessors, (and so understood by the Lessee), that nothing herein con-

tained shall operate to convey or transfer to any Lessor any greater right or interest in the demised premises than he or it may have had prior to the execution hereof; neither is it the intention of any Lessor herein to assume or become liable for the performance or the lack of performance of any duty or obligation of any other Lessor hereunder.

Change of Address.

28. The Lessee covenants and agrees that it will, in the event it changes its place of business or mailing address, promptly notify the Lessors thereof in writing. The Lessors covenant and agree that in the event they change their respective places of business or mailing addresses at any time while interested hereunder they will give like notice thereof to the Lessee. [168]

Forfeiture for Failure to Drill or Pay Royalty.

29. (a) If the actual drilling of the first well herein provided for has not been commenced within the time herein first provided for the commencement thereof, (unless excused from so doing under Paragraph 5 hereof), this lease shall, at the option of the Lessors, automatically cease and terminate, unless prior to such default the time for the commencement of the drilling of such well shall have been extended by the written consent of the Lessors herein. No such extension shall be granted without the payment in advance by the Lessee of an additional sum of money to be mutually agreed upon

and paid at the time of the granting of any such extension, nor shall anything in this paragraph contained be construed as giving to the Lessee any right to demand or receive any such extension.

(b) The failure to pay any rental or royalty payable by the Lessee hereunder within the time herein provided therefor and for 10 days after receipt of written notice of such default given by the Lessors herein shall operate, at the option of the Lessors, to forthwith terminate all of the rights of the Lessee hereunder in and to the demised premises or the portion thereof as to which such default may exist, unless such payment has been excused or prevented by operation of law or by the courts in the enforcement thereof.

Time of Essence.

(c) The Lessee, notwithstanding anything in Paragraph 15 hereof contained, shall not have any time within which to cure any default in the payment of any rental or royalty payable hereunder except as in this Paragraph 29 provided for; nor shall the Lessee have more than 10 days after receipt of notice of default from the Lessors within which to cure any substantial default in the prosecution of the drilling of said first or any subsequent well or in the operation of any well unless excused [169] from so doing under Paragraph 5 hereof, and the Lessors may, (subject to the exceptions hereinafter in this subparagraph contained), forfeit said lease and all of the rights of the Lessee thereunder for any failure on the part of the Lessee to remedy

within the time in this subparagraph permitted any such default in the drilling or operation of any well; provided, however, that any such forfeiture which may result from any default in drilling or operation of any such well or wells shall not operate to deprive the Lessee of the right to retain and operate any existing well or wells as to which no such default may have occurred, and any such existing well or wells so retained and the land surrounding the same which may be reasonably required in the operation thereof shall remain subject to all of the terms and conditions of this lease, but otherwise such forfeiture shall apply to the entire premises, unless the default resulting in such forfeiture shall have occurred on only one of said parcels, in which event it shall apply only to such parcel.

Remedies Cumulative.

30. Any remedies herein provided for shall be deemed to be cumulative with any other remedy or remedies provided by law.

No Provision for Fees or Compensation.

31. No provision of this indenture is made or entered into directly or indirectly for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorney for any party in interest in the bankruptcy proceeding of F. P. Newport Corporation, Ltd., a corporation, bankrupt, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to anyone whomsoever from the assets of said bank-

rupt estate is, in accordance with the law, left entirely to the determination of the Court having jurisdiction of said bankruptcy proceeding unaffected by any provision, term or condition, expressed or implied, of this indenture. [170]

Execution Hereof Subject to Approval of Court.

32. This lease is subject to the approval of the District Court of the United States, Southern District of California, Central Division, and it shall not become or be binding upon any one or more of the parties hereto unless and until an order shall have been made and entered by said court in the Matter of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, No. 25308-M, now pending in said court, authorizing, approving and confirming the execution hereof by the said Trustee in Bankruptcy of said bankrupt estate.

In Witness Whereof, each of the Lessors has hereunto subscribed its or his (as the case may be) name, and the Lessee has hereunto caused its corporate name to be subscribed, and its corporate seal affixed, by its officers thereunto first duly authorized, the day and year first above written.

O. K. W. C. S.

[Seal]

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

By J. E. HATCH

Vice President

By R. T. ADAMS

Asst. Secretary

[Seal] F. P. NEWPORT CORPORATION, LTD.

By F. P. NEWPORT

President

By J. B. GRIBBLE

Secretary

By H. F. METCALF

As Trustee in Bankruptcy of
F. P. Newport Corporation,
Ltd., Bankrupt.

Lessors.

[Seal] UNIVERSAL CONSOLIDATED
OIL COMPANY

By E. G. STARR

President

By R. D. MILLER

Secretary

Lessee. [171]

State of California,
County of Los Angeles—ss.

On this 14th day of January, 1938, before me, Marian Adams, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared J. E. Hatch, known to me to be the Vice President, and R. T. Adams, known to me to be the Assistant Secretary, of Security-First National Bank of Los Angeles, the national banking association that executed the within instrument, known to me to be the persons who executed the within instru-

ment on behalf of said national banking association, and acknowledged to me that such national banking association executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

MARIAN ADAMS

Notary Public in and for the County of Los Angeles, State of California.

My commission expires May 16, 1940.

State of California,
County of Los Angeles—ss.

On this 14th day of January, 1938, before me, Florence C. Grant, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared F. P. Newport, known to me to be the President, and J. B. Gribble, known to me to be the Secretary, of F. P. Newport Corporation, Ltd., the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of said corporation, and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles, State of California. [172]

State of California,
County of Los Angeles—ss.

On this 14th day of January, 1938, before me, Florence C. Grant, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared H. F. Metcalf, known to me to be the person whose name is subscribed to the within instrument as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., Bankrupt, and acknowledged to me that he executed the same as such Trustee.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

FLORENCE C. GRANT

Notary Public in and for the County of Los Angeles, State of California.

State of California,
County of Los Angeles—ss.

On this 14 day of January, 1938, before me, June Eddy, a Notary Public in and for the County of Los Angeles, State of California, residing therein, duly commissioned and sworn, personally appeared E. G. Starr known to me to be the President, and R. D. Miller known to me to be the Secretary, of Universal Consolidated Oil Company, the corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the said corporation, and

acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in said county, the day and year in this certificate first above written.

[Seal]

JUNE EDDY

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 1, 1941. [173]

EXHIBIT "B"

ESCROW AGREEMENT AND
INSTRUCTIONS.

To Title Guarantee and Trust Company,
Los Angeles, California

Gentlemen:

1. The Lessors hereinafter named are handing you herewith an original and duplicate oil and gas lease dated the day of January, 1938, made and entered into by and between Security-First National Bank of Los Angeles, a national banking association, as Trustee under its Trust No. D-7224, F. P. Newport Corporation, Ltd., a corporation, Bankrupt, and the Trustee in Bankruptcy of said F. P. Newport Corporation, Ltd., Bankrupt, as Lessors therein, and Universal Consolidated Oil Company, a California corporation, as Lessee therein, which said lease and the duplicate thereof

have been duly executed by all of the parties thereto, subject to approval and confirmation by the District Court of the United States, Southern District of California, Central Division, in the matter of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, No. 25308-M in the files and records of said Court.

2. Said Lessors will hand to you, if and when it can be obtained, a certified copy of an order made and entered by said Court in said bankruptcy proceeding, approving and confirming the execution of said lease by said trustee in bankruptcy of said bankrupt estate.

3. The said Lessee hands you concurrently herewith the sum of \$25,000.00.

4. Upon receipt by you within thirty (30) days from date hereof of said certified copy of said order you are required to promptly deliver to said Lessee said lease and to said trustee in bankruptcy said sum of \$25,000.00, together with the duplicate of said lease.

5. The said Lessee agrees to pay your escrow charges and for any certificate of title or policy of leasehold insurance which it may see fit to order from you, but delivery of said lease and money shall in no wise be conditioned upon the furnishing of any such certificate or policy or upon the contents thereof.

6. If you are not able to make delivery of said lease, the duplicate thereof and said money in accordance with the foregoing instructions within

thirty (30) days from date hereof you will upon the demand of the said trustee in bankruptcy for the return to him of said lease and duplicate thereof, or upon the demand of said Lessee for the return to it of said money, redeliver to said trustee in bankruptcy said lease and duplicate thereof (after first removing from said lease and the duplicate thereof the signature of the said Lessee and the respective certificates of acknowledgment thereof), and redeliver to said Lessee said money together with its said signatures and the said certificates of acknowledgment thereof; provided, however, that if no such demand be made upon you, you are authorized to make the de- [174] liveries in these instructions first provided for even though said thirty day period may have elapsed prior to the date of such deliveries.

7. The respective parties hereto agree to execute such further and additional instructions, not inconsistent herewith, as are usually and customarily required by you in such matters.

Dated the 14th day of January, 1938.

SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

as Trustee,

By J. E. HATCH

President.

By R. T. ADAMS

Secretary.

F. P. NEWPORT CORPORATION, LTD.

By F. P. NEWPORT

President.

By J. B. GRIBBLE

Secretary.

H. F. METCALF

as Trustee in Bankruptcy of
the Estate of F. P. Newport
Corporation, Ltd., Bankrupt.

UNIVERSAL CONSOLIDATED
OIL COMPANY

By E. G. STARR

President.

By H. D. MILLER

Secretary.

[Endorsed]: Filed Jan. 14, 1938. Ernest R.
Utle, Referee. Filed Nov. 28, 1941. R. S. Zimmer-
man, Clerk. [175]

In the District Court of the United States
Southern District of California
Central Division

In Bankruptcy No. 25308-M.

In the Matter of F. P. NEWPORT CORPORA-
TION, LTD., a corporation,
Bankrupt.

ORDER APPROVING AND AFFIRMING
REFEREE'S ORDER.

Be It Remembered:

That heretofore and on the 15th day of December, 1941, at the hour of 10:00 o'clock A. M., there came on regularly before this Court the motion of H. F. Metcalf, as Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, for an order affirming the order heretofore made and signed by the Honorable Ernest R. Utley, Referee in Bankruptcy, on the 12th day of November, 1941, sustaining the objections of the Trustee to the claim of the Collector of Internal Revenue for \$19,363.65, and disallowing said claim, Messrs. Bailie, Turner & Lake appearing as counsel for said Trustee in Bankruptcy, and Wm. Fleet Palmer, United States Attorney, E. H. Mitchell, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing by Eugene Harpole, Esq., as counsel for the United States of America and Nat Rogan, as United States Collector of Internal Revenue for the

Sixth Collection District of California; and this Court having considered the Referee's Certificate on Review, the Findings of Fact, [176] Conclusions of Law, and Order of the Referee, and the documents referred to in the Referee's Certificate on Review, all of which were transmitted to and filed with this Court by the Referee; and the Court having considered the argument of counsel and being fully advised in the premises, concludes that said order of the Referee so transferred to this Court for review should be affirmed;

Now, Therefore, It Is Ordered, Adjudged and Decreed by the Court:

1. That the Findings of Fact and Conclusions of Law of the Referee in Bankruptcy, dated the 12th day of November, 1941, be and they are hereby approved and affirmed, and adopted by this Court as its Findings of Fact and Conclusions of Law.

2. That the Order of the Referee dated the 12th day of November, 1941, sustaining the objections of the Trustee in Bankruptcy to the claim filed by the Collector of Internal Revenue for \$19,363.65 and disallowing said claim be and it is hereby approved and affirmed.

Dated this 17th day of December, 1941.

PAUL J. McCORMICK

United States District Judge.

Approved as to form pursuant to Rule 44:

WM. FLEET PALMER

United States Attorney

E. H. MITCHELL

Assistant United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

By EUGENE HARPOLE

Attorneys for United States of America
and Nat Rogan, Collector of Internal
Revenue

[Endorsed]: Filed Dec. 17, 1941. R. S. Zimmerman, Clerk. [177]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, a claimant in the above entitled bankruptcy proceeding, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order of the United States District Court for the Southern District of California confirming and approving the Order of Ernest R. Utley, Referee in Bankruptcy, of November 12, 1941, disallowing in full the claim theretofore filed in the above entitled proceeding on behalf of the United States of America for income and excess profits taxes alleged to be due from the bankrupt estate for the taxable years 1938 and 1939, made and entered in this action

through the Honorable Paul J. McCormick, Judge of the above entitled Court, on the 17th day of December, 1941.

Dated: This 12th day of January, 1941.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for United States
of America.

Mailed 1/13/42 copy of Notice of Appeal to
Bailie, Turner & Lake, Esqs. E. L. S.

[Endorsed]: Filed Jan. 13, 1942. [179]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL.

It Is Hereby Stipulated and Agreed by and between the attorneys for the Claimant and the Trustee that, subject to the approval of the Court, the time within which to file the record and docket the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the

same is hereby extended to and including the 12th day of April, 1942.

Dated: This 19th day of February, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Claimant.

BAILIE, TURNER & LAKE,

By NORMAN A. BAILIE,

Attorneys for Trustee.

It Is So Ordered this 20th day of February,
1942.

PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed Feb. 20, 1942. [181]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL AND FOR PREPA-
RATION OF RECORD ON APPEAL

Good cause appearing therefor, It Is Hereby
Ordered that the time within which to file the record
and docket the above entitled cause in the United

States Circuit Court of Appeals for the Ninth Circuit be, and the same hereby, is extended to and including May 12, 1942.

Dated: This 8th day of April, 1942.

ALBERT LEE STEPHENS

Judge of the United States
Circuit Court of Appeals

[Endorsed]: Filed Apr. 8, 1942. [182]

[Title of District Court and Cause.]

CLAIMANT-APPELLANT'S DESIGNATION
OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the District Court of the United
States for the Southern District of California,
Central Division:

You are hereby requested to include in the record
on appeal herein—

1. Petition in Bankruptcy;
2. Order of Adjudication;
3. Order Appointing Trustee;
4. Claim filed by Collector of Internal Revenue
for Deficiencies in 1938 and 1939 Federal income
taxes on July 22, 1940;
5. Trustee's Objection to the Allowance of the
Claim for 1938 and 1939 Federal income taxes filed
September 28, 1940;
6. The Referee's Order of March 17, 1941, Dis-
allowing the Claim of the Collector of Internal Rev-
enue; [183]

7. Motion and Order extending time within which to file an Application for Review of the Referee's Order of March 17, 1941;

8. Petition for Review of Referee's Order of March 17, 1941;

9. Referee's Certificate on Review dated June 27, 1941;

10. Order of District Court dated October 23, 1941, returning records to Referee for making of Findings of Fact and Conclusions of Law;

11. Referee's Findings of Fact, Conclusions of Law and Order Disallowing Claim of Collector of Internal Revenue (Order dated November 12, 1941);

12. Petition for Review dated November 18, 1941;

13. Referee's Certificate on Review dated November 28, 1941;

14. Stipulation of Facts;

15. Trustee's First Report dated March 29, 1938;

16. Trustee's Second Report dated December 8, 1938;

17. Trustee's Second Supplemental Report dated December 22, 1938;

18. Trustee's Third Report dated October 31, 1939;

19. Petition for Authorization, Approval and Confirmation of an Oil and Gas Lease and for Order to Show Cause filed with the Referee on January 14, 1938;

20. Order of District Court dated December 17, 1941 (the Order appealed from) approving and affirming Referee's Order disallowing the claim filed for 1938 and 1939 Federal income taxes;

21. Notice of Appeal;

22. All Orders extending time to docket cause on appeal;

23. This Designation of Record on Appeal;

24. Designation of Points to be Relied upon on appeal;

25. Clerk's Certificate. [184]

This transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and is to be filed in the office of the Clerk of said Circuit Court of Appeals at San Francisco, California.

Dated: This 17th day of April, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Claimant-
Appellant.

Received copy of the within Claimant-Appellant's Designation of Contents of Record on Appeal this 17 day of April, 1942.

BAILIE, TURNER & LAKE,
Attorneys for H. F. Metcalf,
as trustee in Bankruptcy.

[Endorsed]: Filed Apr. 17, 1942. [185]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL.

1. That the District Court and the Referee in Bankruptcy erred in disallowing the claim filed on July 22, 1940, by Nat Rogan as Collector of Internal Revenue for the Sixth Collection District of California on behalf of the United States of America for Federal income taxes for the taxable years 1938 and 1939 in the sum of \$19,363.65 for the reason that said taxes were lawfully due to the United States upon the net income realized by the bankrupt estate from the operation of its property or business during said years.

2. That the District Court and the Referee in Bankruptcy erred in failing and refusing to hold that the Trustee in Bankruptcy was, during the taxable years 1938 and 1939, operating the property [186] or business of F. P. Newport Corporation, Ltd., the bankrupt, within the meaning of Section 52(a) of the Revenue Act of 1939 and the Internal Revenue Code and Section 19.52-2 of Treasury Regulations 103.

3. That the District Court and the Referee in Bankruptcy erred in holding that the net income of \$87,066.42 and \$30,288.99 determined by the Commissioner of Internal Revenue to have been received by said bankrupt's estate and its trustee in bankruptcy during the calendar years 1938 and 1939, respectively, was not subject to Federal income taxes within the meaning of Section 52(a) of the Revenue Act of 1938 and of the Internal Revenue Code.

4. That the District Court and the Referee in Bankruptcy erred in failing to allow the claim filed July 22, 1940, on behalf of the United States of America for 1938 and 1939 income taxes in the sum of \$19,363.65.

Dated: This 17th day of April, 1942.

WM. FLEET PALMER,

United States Attorney,

E. H. MITCHELL,

Asst. U. S. Attorney,

EUGENE HARPOLE,

Special Attorney, Bureau of
Internal Revenue.

By EUGENE HARPOLE,

Attorneys for Appellant.

Received copy of the within Appellant's Statement of Points to Be Urged Upon Appeal.

BAILIE, TURNER & LAKE,

Attorneys for H. F. Metcalf,
as Trustee in Bankruptcy.

[Endorsed]: Filed Apr. 17, 1942. [187]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 187, inclusive, contain full, true and correct copies of: Creditors' Involuntary Petition in Bankruptcy; Adjudication and Order of Reference; Order Appointing H. F. Metcalf, Trustee, etc.; Claim of Collector of Internal Revenue; Objections to Claim of Collector of Internal Revenue; Order Disallowing Claim of Collector of Internal Revenue; Motion for Extension of Time to File Petition for Review and Order thereon Granting; Petition for Review of Referee's Order, filed April 22, 1941; Referee's Certificate on Review, filed June 27, 1941; Order Remanding Record on Review to Referee; Findings of Fact, Conclusions of Law, and Order Disallowing Claim of Collector of Internal Revenue; Petition for Review of Referee's Order, filed November 22, 1941; Referee's Certificate on Review, filed November 28, 1941; Stipulation of Facts; First Report & Account Current of Trustee; Second Report & Account Current of Trustee; Supplement to Second Report and Account Current of Trustee; Third Report & Account Current of Trustee; Petition of Trustee for Confirmation of Oil & Gas Lease; Order Affirming Referee's Order; Notice of Appeal; Orders Extending Time to File Record and Docket Cause on Appeal (two); Desig-

nation of Contents of Record on Appeal; Statement of Points Upon Which Appellant Intends to Rely on Appeal which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court, this 6th day of May, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk.

By EDMUND L. SMITH,

Deputy Clerk.

[Endorsed]: No. 10130. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. H. F. Metcalf, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed, May 7, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10130

In the Matter of F. P. NEWPORT CORPORATION,
LTD., a corporation,
Bankrupt.

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL.

1. That the District Court and the Referee in Bankruptcy erred in disallowing the claim filed on July 22, 1940, by Nat Rogan as Collector of Internal Revenue for the Sixth Collection District of California on behalf of the United States of America for Federal income taxes for the taxable years 1938 and 1939 in the sum of \$19,363.65 for the reason that said taxes were lawfully due to the United States upon the net income realized by the bankrupt estate from the operation of its property or business during said years.

2. That the District Court and the Referee in Bankruptcy erred in failing and refusing to hold that the Trustee in Bankruptcy was, during the taxable years 1938 and 1939, operating the property or business of F. P. Newport Corporation, Ltd., the bankrupt, within the meaning of Section 52(a) of the Revenue Act of 1939 and the Internal Revenue Code and Section 19.52-2 of Treasury Regulations 103.

3. That the District Court and the Referee in Bankruptcy erred in holding that the net income

of \$87,066.42 and \$30,288.99 determined by the Commissioner of Internal Revenue to have been received by said bankrupt's estate and its trustee in bankruptcy during the calendar years 1938 and 1939, respectively, was not subject to Federal income taxes within the meaning of Section 52(a) of the Revenue Act of 1938 and of the Internal Revenue Code.

4. That the District Court and the Referee in Bankruptcy erred in failing to allow the claim filed July 22, 1940, on behalf of the United States of America for 1938 and 1939 income taxes in the sum of \$19,363.65.

Dated: This 17th day of April, 1942.

WM. FLEET PALMER,
United States Attorney,
E. H. MITCHELL,
Asst. U. S. Attorney,
EUGENE HARPOLE,
Special Attorney, Bureau of
Internal Revenue.

By
Attorneys for Appellant.

Received copy of the within Appellant's Statement of Points to Be Urged Upon Appeal this 17 day of April, 1942.

BAILIE, TURNER & LAKE,
Attorneys for H. F. Metcalf
as Trustee in Bankruptcy.

[Endorsed]: Filed May 7, 1942. Paul P. O'Brien,
Clerk.

No. 10130.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

J. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
Bankrupt,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California

BRIEF FOR THE UNITED STATES.

SAMUEL O. CLARK, JR.,

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SEWALL KEY,

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United States Post Office and Court House
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E. H. MITCHELL,

Assistant United States Attorney.

ELBERT HARPOLE,

Special Attorney,

Bureau of Internal Revenue.

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No. 10130.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
Bankrupt,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

There has been no previous opinion in this case. The District Court, in the order appealed from, adopted as its findings of fact and conclusions of law the findings and conclusions of the referee in bankruptcy. [R. 188-189.] The latter may be found at R. 28-41.

Jurisdiction.

F. P. Newport Corporation, Ltd., a corporation, having its principal place of business in the City and County of Los Angeles, State of California, was adjudicated a bankrupt on January 12, 1937, at Los Angeles in the District

Court of the United States for the Southern District of California, and the matter was referred to a referee. [R. 6-7.] On December 17, 1941, the District Court entered an order sustaining the action of the referee in disallowing a claim of the United States for income taxes for the calendar years 1938 and 1939. [R. 188-189.] The jurisdiction of the District Court over the proceeding and the claim is conferred by Section 24, Nineteenth, of the Judicial Code, as amended, and by Section 1 (10) and 2a of the Bankruptcy Act, and in particular subsections (1) and (2) and (5) thereof. Provision for reference of the proceedings to the referee and for review of the order of the referee is found in Sections 22 and 39c of the Bankruptcy Act.

Notice of appeal was filed on January 13, 1942. [R. 190-191.] Jurisdiction is conferred on this Court by Section 128(c) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 24a and b of the Bankruptcy Act.

Question Presented.

The question is whether a trustee in bankruptcy of a corporation engaged in the business of buying and selling real property for profit, who took over the bankrupt's assets, entered upon a program of selling the properties over a period of time, made repairs and improvements, and executed leases, is subject to income tax upon the net income derived from such activities. The answer depends upon whether the trustee was "operating the property or business" within the meaning of Section 52 of the Revenue Act of 1938 and Section 52(a) of the Internal Revenue Code.

Statutes and Regulations Involved.

Revenue Act of 1938, c. 289, 52 Stat. 447:

SEC. 52. CORPORATION RETURNS.

Every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title and such other information for the purpose of carrying out the provisions of this title as the Commissioner with the approval of the Secretary may by regulations prescribe. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer. In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

Section 52(a) of the Internal Revenue Code (U. S. C. 1940 ed., Title 26, Sec. 52) is identical with this provision.

Treasury Regulations 101, promulgated under the Revenue Act of 1938:

ART. 52-2. *Returns by receivers.*—Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and

control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. (See sections 274 and 298 and articles 274-1 and 274-2.) A receiver in charge of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income.

Section 19.52-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code, is identical with this provision.

Statement.

The facts were stipulated. [R. 50-60.] The findings of the referee, which were adopted by the District Court, may be summarized as follows:

The bankrupt, F. P. Newport Corporation, Ltd., a Delaware corporation, was organized in 1929 to conduct a real estate business. It was engaged in the real estate business in California on and prior to March 19, 1935.

[R. 31.] The company was adjudicated a bankrupt on January 12, 1937, and H. F. Metcalf was appointed trustee on March 18, 1937. Since that date the trustee has had possession and control of all the property and assets of the bankrupt, consisting of numerous parcels of improved and unimproved real estate, accounts, promissory notes, bills receivable and other tangible and intangible property. [R. 31-32.]

Prior to the filing of the petition in bankruptcy, approximately 90% of the real estate was encumbered by a deed of trust in favor of the Security-First National Bank of Los Angeles, to secure an indebtedness in excess of \$1,300,000. [R. 32.] The bank filed an unsecured claim for \$500,000 based on a probable deficiency on the trustee's note. Other claims were filed in the approximate aggregate amount of \$300,000. None of the claims has been paid. [R. 32.]

An agreement was reached between the trustee and the bank, with the approval of the District Court, authorizing the trustee to sell the property covered by the deed of trust and to collect rents and income from the properties. [R. 32-33, Ex. A.] Amounts received by the trustee were to be applied to taxes, upkeep expenses, and the balance to be paid on the principal and interest on the loan. [R. 69-70.]

Rather than make forced sales for less than he believed the property to be worth, the trustee "has conducted a selling program which would enable him to spread his sales over a period of time and take advantage of favorable market conditions." All sales made by the trustee were duly approved by order of the court. Pending sale, some of the properties have been rented by the trustee mainly for agricultural purposes. Repairs were made

upon certain properties, and improvements were made upon others to preserve them from the hazards of fire and flood. [R. 35.]

Among the real properties title to which is held by the bank under the declaration of trust are two parcels—one of three and the other of six acres, separated by an intervening three-acre parcel belonging to third persons. Both parcels are situated adjacent to what is known as Channel No. 3 of Long Beach Harbor in the City of Long Beach, California. During the pendency of the bankruptcy proceeding producing oil and gas wells were drilled and other wells were being drilled or about to be drilled on nearby lands which adjoined and surrounded said two parcels. It was feared by the trustee and said Security-First National Bank of Los Angeles that the operation of these wells would drain away the oil and gas believed by the trustee to underlie the same. The trustee in bankruptcy did not have sufficient funds to enable him to drill any oil or gas wells. By and with the approval of the court, he leased the two parcels of land to Universal Consolidated Oil Company. Other lots in the same general area which were not of sufficient size to be covered by separate leases, were included in a community oil and gas lease wherein the Bankline Oil Company was the lessee. [R. 33-34.]

Oil and gas royalties including bonuses actually paid to the trustee under the terms and provisions of the leases during the year 1938 amounted to \$245,517.65 and during the year 1939 amounted to \$206,333.36. These moneys were paid to the bank by the trustee upon orders of the court to cover taxes assessed against the properties, record legal title to which was so held by the bank as security for the indebtedness owing it, costs of engineering services for

checking oil and gas production on the property leased to Universal Consolidated Oil Company, and to apply on account of the interest and principal owing on the secured debt of the said bank. [R. 34.]

From the sales of real estate made during 1938 the trustee received \$5,500, and during 1939, \$18,650 from the same source. Eighty per cent of the moneys so obtained was paid to the bank by the trustee upon order of the court to apply on account of the principal and interest owing the bank. The balance of the receipts was retained by the trustee and used by him in the payment of expenses of administration. [R. 34-35.]

No general order of the court authorizing the trustee to conduct the business of the bankrupt corporation or forbidding him to do so has ever been made or signed. The court has made order authorizing the trustee to lease, pending sale thereof, unsubdivided lands, grant easements and rights of way to the City of Los Angeles and County of Los Angeles for street purposes, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, enter into agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the Universal Consolidated Oil Company lease hereinbefore mentioned pending determination of title disputes to the property covered by the lease, renew contracts with the Oil Field Testing and Engineering Company, Inc., for checking of oil and gas production on said property, and to lease, pending sale, a barn belonging to the bankrupt estate for the storage of hay. [R. 36.]

On the basis of the books of account kept by the trustee, the Commissioner of Internal Revenue made his assessments as follows [R. 37-39]:

1938

RECEIPTS

By sales of real estate approved by Court	\$ 5,500.00
Interest on bankrupt's accounts.....	203.80
Rents collected from miscellaneous properties	4,557.98
Ranch rentals	1,792.50
Collected on bankrupt's old accounts.....	2,007.00
Cash bonus (Universal Consolidated Oil Co. lease)	25,000.00
Oil bonus (Universal Consolidated lease)	25,000.00
Oil and gas royalties.....	195,517.65
Total	<u>\$259,578.93</u>

DEDUCTIONS ALLOWED BY COMMISSIONER

Bankrupt's costs on real estate sold.....	\$ 4,470.60
Commissions to brokers on sales.....	275.00
Trustee's branch office expenses.....	407.34
Verdugo tract upkeep expenses.....	126.53
Other properties upkeep expenses.....	729.71
Ranch upkeep expenses.....	191.30
Title expenses Re: Sales made.....	74.10
Interest paid Security-First National Bank	50,773.40
Taxes paid on properties.....	21,705.76
Trustee's office rent.....	1,440.00
Telephone and telegraph.....	394.50

259,578.93
33,215.76

Office supplies and expenses.....	885.58
Salaries of Trustee's assistants.....	5,145.01
Miscellaneous expenses including Trustee's bond	262.99
Other expenses (Loss of assets through foreclosure)	1,735.56
Depreciation on office fixtures and equipment	614.52
Depletion (oil)	67,517.35
Expense of checking oil and gas production on properties leased to Universal....	1,920.73
Bankruptcy fees allowed by Court.....	13,842.53
<hr/>	
Total	\$172,512.51
Commissioner's Determination of Net Income	\$ 87,066.42

1939

RECEIPTS.

By sales of real estate approved by Court..	\$ 19,450.00	19
Interest on contracts for sales of real estate	17.53	3
Rents from miscellaneous properties.....	4,650.76	27
Ranch rentals	2,038.75	10
Other receipts by sales from miscellaneous personal properties	81.00	10
Oil and gas royalties	206,333.36	10
<hr/>		
Total	\$232,571.40	

DEDUCTIONS ALLOWED BY COMMISSIONER.

Cost of real estate sold.....	\$ 30,770.40
Commissions to brokers on sales.....	1,256.50
Trustee's branch office expenses.....	1,418.98

Verdugo tract upkeep expenses.....	178.82
Ranch upkeep expenses.....	235.46
Other property upkeep expenses.....	1,462.30
Title expenses Re: sales made.....	424.70
Interest paid to Security-First National Bank	46,892.48
Taxes on properties.....	37,304.67
Trustee's office rent.....	320.00
Telephone and telegraph.....	334.06
Office supplies and expenses.....	1,173.81
Salaries to Trustee's assistants.....	4,727.53
Miscellaneous expenses including Trus- tee's bond	130.29
Expenses of checking production under Universal Consolidated oil lease.....	3,982.50
Depreciation on office fixtures and equip- ment	621.50
Depletion (oil)	56,741.67
Bankruptcy fees allowed by Court.....	14,306.82
<hr/>	
Total	\$202,282.41
Commissioner's determination of net income	
	\$ 30,288.99

Statement of Points to Be Urged.

The Government relies on all the points specified [R. 200-201]. In substance, they are that the District Court and the Referee in Bankruptcy erred in failing to hold that the trustee in bankruptcy during the taxable years 1938 and 1939 was operating the property or business of F. P. Newport Corporation, Ltd., the bankrupt, within the meaning of Section 52 of the Revenue Act of 1938

and Section 52(a) of the Internal Revenue Code, and Section 19.52-2 of Treasury Regulations 103, and in holding that the net income received by the trustee during the taxable years in question was not subject to federal income taxes.

Summary of Argument.

By Section 52, Congress intended to tax the income received by trustees in bankruptcy from the operation of the property or business of which they have custody or control. The appellee here was operating the property or business of the bankrupt.

Selling, leasing, renting and managing real property has long been recognized as amounting to the carrying on of business. Here the trustee performed such activities, which other than the purchase of new properties, was precisely the same kind of activities as were previously carried on by the bankrupt. Only a minor part of the trustee's activities involved the liquidation of assets; almost all of the income in question was earned as a result of profitable oil and gas leases which the trustee himself executed. He was not a mere passive recipient of income. Even where income is produced from a process of liquidation, this is no reason why it should be exempt from tax.

In any event, the trustee clearly operated the *property* of the bankrupt, for he did everything with such property that the corporation itself could have done.

Even if the trustee had not engaged in leasing, renting, and managing the property, but had merely realized income from the sale of assets, under the applicable regulations he would be subject to the tax.

ARGUMENT.

The Trustee in Bankruptcy Was Operating the Property or Business of the Bankrupt Corporation and Is Therefore Liable for Income Tax Upon the Income Earned.

1. The manifest purpose of Congress in enacting Section 52 of the income tax statute was to extend the general income tax imposed on corporations to income received by receivers, trustees in bankruptcy, or assignees as a result of the operation of the business or property of which they have custody or control. (See *Reinecke v. Gardner*, 277 U. S. 239; *United States v. Chicago & E. I. Ry. Co.*, 298 Fed. 779 (N. D. Ill.).)¹ The facts of the instant case show clearly that the trustee was “operating the property or business of the corporation” within the meaning and purpose of the statute.

We may assume that the trustee’s ultimate goal was the liquidation of the company and the termination of its business operations. But in the interim—while the trustee waited for favorable opportunities to dispose of the properties—he entered into business transactions involving the assets of the enterprise to realize income from them. Other than purchasing new properties, the trustee engaged in precisely the same kind of activities as were previously carried on by the bankrupt.

Broadly speaking, the trustee engaged in selling, leasing, renting and managing the real property. It has been long recognized that such activities amount to the operation or

¹The Government’s claims for taxes accruing during administration in bankruptcy is entitled to priority as an administrative expense. *In re Lambertville Rubber Co.*, 111 F. (2d) 45 (C. C. A. 3d); *Florida Nat. Bank of Jacksonville v. United States*, 87 F. (2d) 896 (C. C. A. 5th).

carrying on of business. (See *Flint v. Stone Tracy Co.*, 220 U. S. 107, 169-171; *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503; *United States v. Peabody Co.*, 104 Fed. (2d) 267 (C. C. A. 6th); *Page v. M. Rich & Bros. Co.*, 99 Fed. (2d) 607 (C. C. A. 5th); certiorari denied, 306 U. S. 662; *Harmar Coal Co. v. Heiner*, 34 Fed. (2d) 725, 727 (C. C. A. 3d), certiorari denied, 280 U. S. 610.)

The trustee embarked upon a "selling program which would enable him to spread his sales over a period of time and take advantage of favorable market conditions". [R. 56.] While this was being done, the trustee rented certain of the properties for agricultural purposes and collected rents. The amounts received were applied to pay taxes, upkeep, and expenses, the balance being used to repay the bank loan. Moreover, the trustee executed oil and gas leases upon certain of the properties, from which he received bonuses and royalties aggregating \$245,517.65 in 1938 and \$206,333.36 in 1939. The moneys were paid to the bank by the trustee, upon orders of the court, to cover taxes assessed against the properties, costs of engineering services and checking oil and gas production, and to apply on the bankrupt's obligation to the bank. [R. 55.]

During these years, only a minor part of the trustee's operations involved the liquidation of assets. Clearly a comparison of the total receipts from properties sold—some \$25,000—and the estimated value of the total property held by the trustee—some \$880,000²—would indicate that any liquidation of the properties held was negligible

²The Security-First National Bank of Los Angeles, which had record title to approximately 90% of the real properties received by the trustee as security for a \$1,500,000 indebtedness owed it, valued such security at \$800,000 and credited it upon the indebtedness, filing an unsecured claim for \$500,000. [R. 53.]

in extent. Moreover, the trustee's books for 1938 show receipts from sales of only \$5,500, whereas rents, royalties, and bonuses of over \$250,000 were collected. The 1939 records reveal that there were sales of \$19,450, whereas rents and royalties amounted to in excess of \$210,000. Although the trustee may have planned eventually to liquidate the property, it is plain that during the taxable years 1938 and 1939, he was in fact primarily engaged in operating the property or business to produce earnings and profits.

Certainly where a trustee in bankruptcy deals with the assets of a bankrupt in this manner he is operating the property or business within the meaning of the statute. In this connection it is important to emphasize that even if income is produced from a process of liquidation, there is no reason why it should be exempt from tax. As the Supreme Court stated in *Heiner v. Mellon*, 304 U. S. 271, 275, "Profits made in the business of liquidation are taxable in the same way and to the same extent as if made in an expanding business." *A fortiori*, there is no reason to exempt income earned from business operations, which were not themselves a liquidation, although conducted while awaiting favorable opportunity to liquidate. By the same token, there is no reason to exempt property from taxes merely because it is held by a trustee in bankruptcy or a receiver. (*Stwarts v. Hammer*, 194 U. S. 441; *In re Tyler*, 149 U. S. 164, 182; *Buckley v. Commissioner*, 66 Fed. (2d) 394 (C. C. A. 2d), certiorari denied, 290 U. S. 698.)

Section 52 of the Revenue Act of 1938 should be construed in the light of its plain purpose to subject corporate enterprises, which are in the hands of receivers or

trustees, to income tax in the same manner as if they were still being operated by the officers and directors. This broad purpose should not be defeated by a restrictive construction of the phrase "operating the property or business".

It should also be noted that the statute does not require that *both* the property and business of the corporation be operated, but uses the disjunctive "or" between the words "property" and "business". Consequently, as a matter of technical construction, if either the property or business of a corporation is being operated by the trustee, the requirements of the statute are met. It is difficult to conclude that the trustee was not at least operating the *property* of the bankrupt. Certainly the trustee did virtually everything with the property that the corporation itself could have done, *i. e.*, sold some of the property, leased and rented other parcels, made repairs and improvements, and attempted to dispose of the remaining properties at favorable prices. That the corporation itself could have done more with such property is hard to conceive. (See G. C. M. 3876, VII-1 Cum. Bull. 127 (1928); I. T. 2626, XI-1 Cum. Bull. 55 (1932).)

It is obviously immaterial that there was no *general* order of the court authorizing or forbidding the trustee to operate the bankrupt's business. It appears that every transaction which the trustee entered into and executed was authorized and approved by the court, and it has not been suggested that he was acting outside the proper scope of his authority in conducting the operations. Even if he had, however, the point would be irrelevant in determining the application of the income tax law. *Cf* *United States v. Sullivan*, 274 U. S. 259, holding that

income from an illegal business is taxable. The statute clearly is concerned with what *in fact* the trustee did and not with what he was authorized to do. The determining consideration here is that the trustee did manage the bankrupt's assets to realize net income.

2. The Board of Tax Appeals has recently sustained the tax liability of an assignee under Section 52 in a similar situation where, in fact, there appears to have been far greater emphasis placed upon the liquidation of the business. (*Louisville Property Co. v. Commissioner*, 47 B. T. A. No. 6.) In this case, a receiver had been appointed for the purpose of paying the debts and winding up the affairs of the Louisville Property Company, a corporation which, by its charter, was authorized to deal in all kinds of property. H. C. Williams was appointed assignee and was assigned all of the assets of the company for the payment of the debts of the assignor and the expenses of administration, and the distribution of the remainder, if any, to the stockholders. Afterwards the corporation was to be dissolved. Williams proceeded to liquidate and dispose of the assets received as fast as he could advantageously without sacrificing their value. Some of the lands transferred to Williams contained minable coal, the rights to which had been leased to coal operators who paid Williams royalties on the coal mined. Williams at no time carried on any mining operations on the lands. The Board held that Williams was "operating the property or business" of the Louisville Property Company under Section 52 of the Revenue Acts of 1934 and 1936. The following quotation from the Board's opinion is squarely in point here:

In the instant proceedings we think the evidence clearly shows that Williams was "operating the prop-

erty or business” of the Louisville Property Company within the meaning of the applicable statute and regulations * * *. He was deriving income from sales of coal and timber, collecting rents, and entering into royalty contracts, and he disposed of approximately 12,000 acres of land * * *.

An excellent state court case construing the phrase “operating the property or business” within the meaning of Section 52 is *State v. American Bonding & Cas. Co.*, 225 Iowa 638, 281 N. W. 172. There a company which conducted a casualty insurance business was declared insolvent and dissolution directed. The receiver who was appointed took over the company’s assets, but because of the magnitude and complexity of the claims did not reduce the assets to cash, but rather collected the interest on securities and rents from the real estate which he held and invested the money thus received in additional securities and collected income therefrom. A claim was filed by the United States under Section 52 for income taxes on income from the property in the hands of the receiver. The Supreme Court of Iowa held that the receiver was “operating the property or business”. The following quotation from the court’s opinion is particularly pertinent and equally applicable to the facts of the instant case (pp. 643-644):

We think the question here discussed was very clearly and convincingly considered in the written opinion of the trial judge in the instant case wherein, after considering the meaning of the words “operating”, “property”, and “business”, and sustaining his conclusion as to the meaning and implication of these words by abundant authority, he proceeded to say:

"The receiver says he is a liquidating receiver. To liquidate in its general and usual sense means to assemble and mobilize the assets, settle with the creditors and debtors, and apportion the remaining assets, if any, among the stockholders or owners. *Ex parte Amos*, 94 Fla. 1023, 114 So. 760, 765, *Lafayette Tr. Co. v. Beggs*, 213 N. Y. 280, 107 N. E. 644, 645, *Gilna v. Barker*, 78 Mont. 357, 254 Pac. 174, *Rohr v. Stanton Tr. & Sav. Bank*, 76 Mont. 248, 245 Pac. 947, 948.

* * * * *

"In one sense this receivership is a liquidating receivership as the ultimate object is the liquidating of the company and it is true that the receiver was not operating the business as it was conducted by the corporation. On the other hand can it be said that he was not operating a part of the business, *that of investing the assets for the purpose of deriving revenue therefrom under the specific orders of this court. A fortiori* he was operating the property, within the meaning of the word as above defined, in taking possession of the assets, notes, bonds, and mortgages, collecting them, selling certain bonds and mortgages and reinvesting the proceeds in other bonds, mortgages, and securities, in managing such real estate as the corporation owned or the receivership acquired, in leasing, repairing, and collecting the rents and revenues therefrom. It seems to me that this receivership comes fairly within the phrase 'receiver operating the property or business', *especially in connection with the words occurring later in the statute, 'of whose business or property they have custody and control'.*" (Italics supplied.)

Moreover, a persuasive analogy in support of our position is to be found in the decisions of this court consid-

ering the question whether a trust is "doing business" so as to be taxable as an association. Thus in *United States v. Trust No. B I. 35, Etc.*, 107 Fed. (2d) 22, where the trustee collected proceeds from oil leases, renewed certain marketing agreements, and arranged for and executed an oil lease, this court held that the taxpayer was engaging in a productive business for profit and was thereby taxable as an association.

Again in *Kettleman Hills R. S. No. 1 v. Commissioner*, 116 Fed. (2d) 382, certiorari denied, 313 U. S. 582, this court held that a trust in corporate form, which administered royalty rights contracts with an oil company, and which had an option to receive interest in oil and gas or money, and a right to store and process and dispose of the oil and gas received, was (p. 383) "making a succession of business judgments" in determining whether it would "require the delivery of the royalty product in kind or in cash", and was thereby "doing business" so as to be subject to tax as an association, "though through the tax years in question it thought it better business to accept cash rather than the oil products". Likewise in the instant case the lease made by the trustee provided for a bonus of \$25,000 and a royalty of 35% of the oil produced, such royalty being payable either in cash or in kind at the option of the trustee. [R. 158-159.]

Similarly in *United States v. Rayburn*, 91 Fed. (2d) 162, the Circuit Court of Appeals for the Eighth Circuit reached the same conclusion where the only business car-

ried on by the trustees was the execution of certain oil leases, the collection of bonuses and rentals and the distribution of the net proceeds to the beneficiaries. The court rejected the claim that the purpose of the trust was to liquidate the land and upheld the contention of the Government that one of the purposes of the trust was to hold the land (p. 165) "to await future opportunities", and while so doing, business was carried on.³

3. The conclusion that the trustee is liable for the tax upon the income in the circumstances of this case follows *a fortiori* from the interpretation of the statute contained in the applicable regulations. Treasury Regulations 101, Article 52-2; Treasury Regulations 103, Section 19.52-2. The regulations provide that:

If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation.

³Of course, the fact that a wasting asset is being depleted does not mean that a property is merely being liquidated and no business carried on. *Von Baumbach v. Sargent Land Co.*, *supra*; *Louisville Property Co. v. Commissioner*, *supra*; *Harmar Coal Co. v. Heiner*, *supra*; *Lyon Lumber Co. v. Harrison*, 113 F. (2d) 443 (C. C. A. 7th); *United States v. Hercules Mining Co.*, 119 F. (2d) 288 (C. C. A. 9th), certiorari denied 314 U. S. 658. See also, Treasury Regulations 64 (1936 ed.), Art. 43(a) (3). As this Court said in *United States v. Trust No. B. I. 35, Etc.*, *supra* (p. 26):

A further false premise is that the owner of oil land, some leased and some free to lease, with oil sands developed at a certain depth and * * * the contemplated possibility of still deeper deposits, is not engaging in a productive business for profit when its lessee extracts the oil, but is merely liquidating its capital investment. To state the proposition is to refute it. * * *

This interpretation, of course, is equally apt in the case of a trustee as well as a receiver.⁴ Thus, on the basis of the administrative construction which has been given the statute, the fact that the trustee was engaged in a program for the liquidation of the properties is alone sufficient to make him liable for the tax upon any income earned in the process. Even if the trustee had not engaged in leasing, managing and renting the properties but had merely realized income from the sale of the assets, he would be subject to the tax.

The validity of this interpretation—at least in its application to a situation where, as here, the trustee has embarked upon a program for the liquidation of the assets over a period of time—can hardly be questioned in view of the Supreme Court's recent decision in *Magruder v. Washington, Baltimore & Annapolis Realty Corp.*, decided April 13, 1942, not yet officially reported but found in 1942 C. C. H., Vol. 4, Par. 9416. In that case, the question was whether a liquidating corporation was "carrying on or doing business" within the meaning of Section 105(a) of the Revenue Act of 1935, and subsequent acts, and was therefore liable for capital stock tax. The taxpayer, since its incorporation, had been carrying on negotiations for the sale of its properties, selling them as satis-

⁴While the provision of the applicable regulation uses only the term "receiver", it can hardly be maintained that a trustee in bankruptcy or an assignee who marshals, sells and disposes of a corporation's assets for purposes of liquidation, should be treated differently for income tax purposes from a receiver who performs those identical functions. No sound reason would appear for drawing any such distinction. (See *Louisville Property Co. v. Commissioner*, *supra*.) Indeed the fact that a trustee in bankruptcy or assignee acquires title to the assets of the corporation while a receiver does not, would, if anything, be even more reason for imposing the tax upon the trustee. Both in Section 52(a) and in other provisions of the Revenue Acts, Congress has clearly evidenced an intent to treat trustees in bankruptcy and receivers of corporations in the same manner. See, *e. g.*, Sections 13(e), 52(a), and 274 of the Revenue Act of 1938.

factory offers were received, and renting unsold properties under short term leases in an attempt to earn the carrying charges pending ultimate sale. The regulations provided that (Treasury Regulations 64 (1936 ed.), Article 43(a) (5)—

* * * “doing business” includes any activities of a corporation whether it engages in—

* * * * *

(5) the orderly liquidation of property by negotiating sales from time to time as opportunity and judgment dictate and distributing the proceeds as liquidation is effected * * *.

The Supreme Court sustained the validity and application of the regulation. (See also, *Edgar Estates Corp. v. United States*, 65 C. Cls. 415; *Conhaim Holding Co. v. Willcuts*, 21 Fed. (2d) 91 (Minn.). See also G. C. M. 3876, VII-1 Cum. Bull. 127 (1938); I. T. 2626, XI-1 Cum. Bull. 55 (1932).)

If a corporation engaged in the type of activities performed by the trustee in the instant case is properly held to be “doing business” for purposes of the capital stock tax, it certainly must follow that the trustee in bankruptcy is “operating the business or property” within the meaning of Section 52(a).

The statutory phrase “operating the property or business,” like the phrase “doing business” is patently of sufficient ambiguity to render an administrative interpretation appropriate. It is true that in many factual situations the meaning of the phrase “operating the property or business” will be perfectly obvious. But, on the other hand, here, as in the statutes using such expressions as

“net income * * * from the property”⁵ or “ordinary and necessary,”⁶ “the Congress has not prescribed a precise formula free from all ambiguity” (*Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 102), or used terms “so clear and unambiguous in their meaning as to leave no room for an interpretative regulation” (*Textile Mills Corp. v. Commissioner*, 314 U. S. 326).

We can perceive no basis for questioning the reasonableness of the administrative interpretation in its application to the facts of the instant case. Moreover, the regulation has been in effect since 1934, and the successive reenactments of the statute since that date lend even greater support to its validity. (*Brewster v. Gage*, 280 U. S. 327; *Textile Mills Corp. v. Commissioner*, *supra*. Cf. *Morgan v. Commissioner*, 309 U. S. 78, 81; *Helvering v. Winnill*, 305 U. S. 79, 83.)

4. Cases which have held that a trustee was not operating a business or property under Section 52 are readily distinguishable on their facts. In *In re Heller, Hirsh & Co.*, 248 Fed. 208 (C. C. A. 2d), for example, the trustee in bankruptcy had done nothing more than collect the proceeds from a claim which he compromised arising under a contract entered into and completely executed by the corporation *prior to the bankruptcy*.

Other decisions have been handed down by the lower courts. In *In re Owl Drug*, 21 Fed. Supp. 907 (Nev.), the trustee in bankruptcy took over the drug stores which the bankrupt had formerly operated. The trustee, after

⁵Revenue Act of 1928, c. 852, 45 Stat. 791, 821, Sec. 114(b) (3); *Helvering v. Wilshire Oil Co.*, 308 U. S. 90, 102.

⁶Revenue Act of 1928, *supra*, Sec. 23(a); *Textile Mills Corp. v. Commissioner*, 314 U. S. 326.

selling the business and all of its assets as a going concern, deposited the proceeds thus received in various banks. The District Court held that the interest earned on such deposits was not gain derived from the operation of the bankrupt's property or business. It is obvious that in this case, unlike the present case, the income in question was earned after the actual business of the bankrupt had been liquidated. As the court itself declared (p. 911):

After the bankruptcy, the trustee continued to operate the stores for a while. Then he sold them. When he did, *the business of the bankrupt was liquidated.*

The *Owl Drug* case is further distinguishable in that the trustee there was nothing more than a passive recipient of the income earned.⁷ No activity was engaged in by him for the purpose of earning a profit, but rather the cash received from the liquidation was deposited merely to await the determination of the validity of certain claims.

Doehler Die Casting Co. v. Meadows Mfg. Co. (S. D. Ill.), decided September 20, 1938, not reported but found in 1938 C. C. H., Vol. 4, Par. 9498, is also distinguishable on the ground that the receiver had disposed of practically all the assets and become inactive except with respect to collecting certain accounts and royalties from contracts which the *corporation* had entered into.

⁷See *Foss v. Commissioner*, 75 F. (2d) 326 (C. C. A. 1st), distinguishing the passive receipt of income from the "carrying on of business" within the meaning of Sec. 23(a) of the Internal Revenue Code, which permits the deduction of business expenses.

Conclusion.

The order of the court below approving and affirming the referee's disallowance of the claim of the United States should be reversed.

Respectfully submitted,

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July, 1942.

No. 10130

IN THE

10
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

H. F. METCALF, as Trustee in Bankruptcy of the Estate
of F. P. Newport Corporation, Ltd., a corporation,
Bankrupt,

Appellee.

Brief for H. F. Metcalf, as Trustee in Bankruptcy of
F. P. Newport Corporation, Ltd., a Bankrupt,
Appellee.

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Opinion Below.

The District Court wrote no opinion in this case. The Court, however, adopted as its Findings of Fact and Conclusions of Law the Findings and Conclusions of the Referee in Bankruptcy. [R. 188, 189.] These Findings and Conclusions may be found at R. 28-41 and part of the Findings are hereinafter set forth in this brief.

Jurisdiction.

The jurisdiction of this Court to entertain the appeal of the United States is referred to in the Government's brief, and we see no occasion for repeating the sections therein mentioned.

Question Presented.

The question here involved as we see it is whether or not the Trustee in Bankruptcy in these proceedings, who has not been authorized to conduct the business which the Bankrupt Corporation engaged in prior to the filing of the petition in bankruptcy, is required to pay "income tax" on receipts resulting from transactions had by such Trustee in Bankruptcy in the performance of his normal duties pursuant to the provisions of the Bankruptcy Act.

Applicable Statute.

The answer to the foregoing question depends upon whether or not Mr. Metcalf, the Trustee in Bankruptcy, was operating the business or property of the corporation within the meaning of Section 52 (a) of the Internal Revenue Code. This statute is set out in full on page 3 of the Government's brief.

The Treasury Regulations referred to by the Government are not, we submit, of aid in arriving at an answer to the question hereinbefore mentioned. We shall hereinafter point out wherein such regulations are inapplicable.

Statement of Facts.

The facts were stipulated. [R. 50-60.] The Findings of the Referee which were adopted by the District Court are based upon the stipulation and the Government has attempted to summarize the same in its brief. This summary, however, is not in our opinion wholly accurate, and we therefore set out Findings 1 to 13, both inclusive, as follows:

“The Court finds that:

“1. The Commissioner of Internal Revenue determined deficiencies of \$14,365.96 and \$4,997.69 in the bankrupt's Federal income tax for the calendar years 1938 and 1939, respectively. Notice of the Commissioner's determination was sent to 'F. P. Newport Corporation, Ltd., H. F. Metcalf, Trustee in Bankruptcy, 216 Central Building, 108 West Sixth Street, Los Angeles, California' by registered mail on July 13, 1940. On July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, filed a claim in the above entitled bankruptcy proceeding on behalf of the United States for the sum of \$19,363.65, representing the amount of alleged deficiencies in income tax so determined by the Commissioner of Internal Revenue for the taxable years 1938 and 1939. On September 28, 1940, the Trustee in Bankruptcy filed an objection in writing to the allowance of said claim.

“2. The bankrupt, F. P. Newport Corporation, Ltd., was organized under the laws of the State of Delaware on December 2, 1929, and it afterward qualified to do business in the State of California. It was engaged in the real estate business in the State of California prior to March 19, 1935. In the con-

duct of said business it purchased large tracts of unimproved lands, subdivided portions of them into city lots, installed the essential public improvements and then endeavored to sell the lots, and did sell a great many of them. It also acted as a selling agent for many parcels of real property owned by other persons. It conducted its business for the purpose of making a profit.

"3. On March 19, 1935, an involuntary petition in bankruptcy was filed against F. P. Newport Corporation, Ltd., in the United States District Court for the Southern District of California, Central Division, in case numbered 25,308-M, Bankruptcy. A receiver was thereupon appointed by the Court. All of the assets and affairs [33] of F. P. Newport Corporation, Ltd. were placed in the possession and control of said receiver. The receivership continued until January 12, 1937, when the corporation was adjudicated a bankrupt. H. F. Metcalf was appointed Trustee in Bankruptcy on March 18, 1937, and at all times since has been in possession and control of all the property and assets of the bankrupt.

"4. The properties and assets received from the bankrupt by said Trustee in Bankruptcy consisted of numerous parcels of real estate, both improved and unimproved, and other assets consisting of accounts, promissory notes, bills receivable and other tangible and intangible property.

"5. At the date of bankruptcy record legal title to approximately ninety per cent of the real properties received by the Trustee in Bankruptcy stood in the name of the Security-First National Bank of Los Angeles, in trust, as security for an indebtedness owing said bank by said F. P. Newport Corporation, Ltd., as evidenced by a written declaration of trust

numbered D-7224, formerly numbered SS-70401, signed by the bank, approved by the bankrupt, on March 1, 1930. At the date of filing the petition in bankruptcy said indebtedness exceeded \$1,300,000.00. Said bank filed a claim in the bankruptcy proceeding as an unsecured creditor in the amount of \$500,000.00, after crediting what it determined to be the value of the security held by it upon the indebtedness of F. P. Newport Corporation, Ltd. Claims filed against the bankrupt estate other than the claim of said bank exceed in all the sum of \$295,000.00, none of which have been paid by the Trustee in Bankruptcy, either in whole or in part.

“6. For the purpose of avoiding a forced sale of said real properties and with the object of obtaining time within which to liquidate the properties at a fair value, a contract was made and entered into by and between Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., the bankrupt, and the [34] Trustee in Bankruptcy with the approval of this Court. A copy of said agreement, with the supplements thereto and modifications thereof, is attached to said stipulation of facts, marked Exhibit ‘A’, and is by reference made a part hereof, as fully and completely as though here copied and set forth at length.

“7. Among the real properties title to which is so held by said bank under said declaration of trust are two parcels—one of three and the other of six acres, separated by an intervening three-acre parcel belonging to third persons. Both parcels are situated adjacent to what is known as Channel No. 3 of Long Beach Harbor in the City of Long Beach, California. During the pendency of the bankruptcy proceeding producing oil and gas wells were drilled and other wells were being drilled or about to be

drilled on nearby lands which adjoined and surrounded said two parcels. It was feared by the Trustee and said Security-First National Bank of Los Angeles that the operation of these wells would drain away the oil and gas believed by the Trustee to underlie the same. The Trustee in Bankruptcy did not have sufficient funds to enable him to drill any oil or gas wells. By and with the approval of this Court, he leased the said two parcels of land to Universal Consolidated Oil Company, a copy of which lease is attached to the Trustee's Petition for Authorization, Approval and Confirmation of an Oil and Gas Lease, and for Order to Show Cause, filed with the Court on January 14, 1938, reference to which is hereby made for further particulars, and the same is made a part hereof by said reference as fully and completely as though here copied and set forth at length. Other lots in the same general area which were not of sufficient size to be covered by separate leases, were included in a community oil and gas lease wherein the Bankline Oil Company was the lessee.

"8. Oil and gas royalties including bonuses actually paid to the Trustee under the terms and provisions of said leases during the year 1938 amounted to \$245,517.65 and during the year 1939 amounted [35] to \$206,333.36. These moneys were paid to the bank by the Trustee upon orders of this Court to cover taxes assessed against the properties, record legal title to which was so held by the bank as security for the indebtedness owing it, costs of engineering services for checking oil and gas production on the property leased to Universal Consolidated Oil Company, and to apply on account of the interest and principal owing on the secured debt of the said bank.

"9. From the sales of real estate made during 1938 the Trustee received \$5,600.00 and during 1939 \$18,650.00 from the same source. Eighty per cent of the moneys so obtained were paid to the bank by the Trustee upon order of the Court to apply on account of the principal and interest owing said bank on its said secured debt. Twenty per cent of said receipts were retained by the Trustee and used by him in payment of expenses of administration.

"10. The Trustee in Bankruptcy has endeavored at all times since his appointment to sell various properties of the bankrupt at prices commensurate with their value. Due to depressed market conditions, sales have been slow. The indebtedness of the estate is considerable and the Trustee has believed it to be to the best interest of the creditors not to sacrifice the properties by an immediate sale under the aforesaid conditions and, accordingly, has conducted a selling program which would enable him to spread his sales over a period of time and take advantage of favorable market conditions. All sales made by said Trustee were duly approved by order of Court. Pending sale, some of the unsubdivided properties, (other than the properties covered by the oil leases hereinbefore mentioned), have been rented by the Trustee mainly for agricultural purposes.

"11. It was necessary for the trustee from time to time to make repairs upon certain of the properties and to make or have made certain improvements on some properties to preserve them from hazards of fire and flood pending a sale thereof. [36]

"12. The Trustee in Bankruptcy has participated in all of the transactions set forth in his First, Second, Supplemental Second and Third Reports and Accounts filed on March 29, 1938, December 8, 1938,

December 22, 1938, and October 31, 1939, respectively. He has not engaged in the purchase or subdivision of real property nor acted as a selling agent for owners of property.

“13. No general order of the Court authorizing the Trustee to conduct the business of the bankrupt corporation or forbidding him to do so has ever been made or signed. The Court has made orders authorizing the Trustee to lease, pending sale thereof, unsubdivided lands, grant easements and rights of way to the City of Los Angeles and County of Los Angeles for street purposes, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, enter into agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the Universal Consolidated Oil Company lease hereinbefore mentioned pending determination of title disputes to the property covered by the lease, renew contracts with the Oil Field Testing and Engineering Company, Inc. for the checking of oil and gas production on said property, and to lease, pending sale, a barn belonging to the bankrupt estate for the storage of hay.” [R. 30 to 36, inclusive.]

Finding 14 is set out at pages 8, 9 and 10 of the Government's brief and is the compilation by the Collector of the receipts and disbursements of the Trustee in Bankruptcy for the years 1938 and 1939.

The agreement and supplement thereto and modifications thereof referred to in Finding 6 are found at pages 61 to 94 of the Record. These documents disclose that at the time of the execution of the original agreement the Bankrupt Corporation was indebted to Security-First National Bank of Los Angeles in a sum in excess of \$1,300,000.00 [R. 62], and that this indebtedness was long overdue and was secured by approximately 90% of all of the properties of the Bankrupt Corporation. [R. 53.] The documents mentioned provided for the payment of the indebtedness so due the bank in installments over a period of approximately two and one-half years. [R. 81.] Provision was made for the liquidation of the properties, record legal title to which was held by the bank, at such prices and upon such terms and conditions as should be approved by the bank, the Trustee in Bankruptcy and the Court. Proceeds of the sale were to be paid to the bank by the Trustee in Bankruptcy after deducting expenses of sale. All contracts of sale were to be executed by the bank; all leases and rental agreements were to be executed by the bank. The Trustee in Bankruptcy, however, was authorized to keep out of any rentals collected on the properties up to \$7,000.00 for the period of one year. [R. 72.] The rentals collected by the Trustee in Bankruptcy were during the years 1938 and 1939 considerably less than \$7,000.00 for each of said years. [R. 37 and 38.] By agreement, however, with the bank the Trustee in Bankruptcy was permitted to retain 20% of the gross proceeds of the sale

of real properties for the purpose of paying costs of sale and expenses of administration. [R. 35.]

The Universal Consolidated Oil Company lease referred to in the Findings is to be found at pages 149 to 184 of the Record. The principal receipts of the Trustee in Bankruptcy during the years 1938 and 1939 were through oil royalties received under this lease. [R. 37 and 38.] Royalties in a small sum were received from the community oil and gas lease covering scattered lots insufficient in size to justify separate leases. [R. 34.] The fact that the amounts so received from the community oil and gas lease are comparatively insignificant is disclosed by the reports of the Trustee in Bankruptcy which are set forth in the Record, pages 94 to 138. The oil royalties so received were paid to the Security-First National Bank of Los Angeles by the Trustee in Bankruptcy to cover (1) taxes assessed against the properties, record legal title to which is held by the bank, (2) costs of engineering services for checking oil and gas production, and (3) principal and interest owing said bank. (Finding 8, *supra*.)

ARGUMENT.

I.

The Burden of Proof to Establish That the Transactions Had by the Trustee in Bankruptcy Subjected Him to Payment of Income Taxes Is Upon the Government.

Prior to 1916 a Trustee in Bankruptcy was not subject to the payment of income tax upon his receipts whether he was operating the business or property of the bankrupt or not. In 1916 the predecessor of Section 52 (a) of the Internal Revenue Act was passed by Congress in essentially the same language as the present act. Statutes imposing a tax must be construed most strongly against the Government and in favor of the citizen. In *Gould v. Gould*, 62 Law Ed. 211, it is said:

“In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.” (Citing cases.)

In *Reinecke v. Gardner*, 72 Law Ed. 866, at page 867, it is said:

“As under the bankruptcy act the entire property of the bankrupt vested in the trustee, the income in question was not the income of the bankrupt corporation but of the trustee and was subject to income and excess profits tax only if the statutes authorized the assessment of the tax against him. * * *

“* * * A tax imposed on corporations alone does not extend to a trustee in bankruptcy of a corporation.”

See also:

In the Matter of Owl Drug Co., Bankrupt, 21 Fed. Supp. 907.

II.

The Trustee in Bankruptcy, H. F. Metcalf, Was Neither Authorized to nor Did in Fact "Operate the Business or Property" of the Bankrupt Corporation.

Section 2, Subdivision (5) of the Bankruptcy Act provides:

"Authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates, and allow such officers additional compensation for such services, as provided in section 48 of this Act."

No order authorizing the Trustee in Bankruptcy to conduct the business of the Bankrupt Corporation was ever made or entered. (Finding 13, *supra*.) If the Trustee in Bankruptcy could conduct the business of the corporation without authority of the Court then there was no purpose in enacting Subdivision (5) of Section 2 above mentioned. Regarding a similar provision in Chapter XI of the Bankruptcy Act this Court said in *Urban Properties Corporation v. Benson*, 116 Fed. (2d) 321, at page 323, as follows:

"No trustee has the power to operate the business of the debtor until 'authorized' to do so by the order of the court and then he operates it 'subject to the control of the court.'"

In *In the Matter of Standard Electro-Medical Corporation, Bankrupt*, 38 A. B. R. (N. S.) 407 (Ref. N. D. Cal.), it is said:

"In other words if, and when, a *trustee with permission of a court of bankruptcy*, has been authorized

to conduct, and has 'conducted' the bankrupt corporation's business, or has *maintained* its property 'in a manner to effect accomplishment of results appropriate to the nature of the enterprise,' or has 'put it to actual use in the business or employment for which it has been constructed,' then, and then only, and for the period during which such trustee shall so *operate* the property, or *conduct* the business of the bankrupt corporation, shall he, as such trustee, be compelled, under the revenue law in controversy, to make a return for such bankrupt corporation in the same manner and form as corporations are required to make such returns in order to enable the agent of the government—the interested Collector of Internal Revenue—to determine the amount of taxes to be paid, not by the bankrupt corporation, *but by the trustee in bankruptcy conducting the business thereof.* *In re Owl Drug Co.* (D. C. Nev.), 36 Am. B. R. (N. S.) 777, 21 F. Supp. 907, 910." (Italics ours.)

The duties of the Trustee in Bankruptcy are to be found in several sections of the Bankruptcy Act and in the General Orders but in particular in Section 47. This section provides in part as follows:

"Trustees shall (1) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estates as expeditiously as is compatible with the best interests of the parties in interest."

Section 27 provides as follows:

"The *receiver or* trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

In *Remington on Bankruptcy*, Volume 2, 4th Edition, at pages 687 and 688, it is said:

“The chief duty of the trustee is to make the bankrupt estate available for the benefit of the general creditors. Trustees are required to collect and reduce to money the property of estates for which they are trustees, as expeditiously as is compatible with the best interests of the parties in interest. And he must use due diligence in collecting the assets and may be charged with the value of assets lost by failure to discharge such duty.”

At page 691:

“In liquidating an estate, the trustee proceeds under the direction of the court. It is the court that is given power to cause estates to be liquidated and to close estates. This power is exercised by the appointment of a trustee who thereupon is required to proceed with the various steps which the Act requires him to take, but it must not be forgotten that he is the arm of the court, and at all times subject to the orders of the court in whatever he does.”

And at page 701:

“Trustee has a duty to preserve property which comes into his custody even if it may be subject to reclamation, and reasonable expenses of preservation may be charged against reclaimants.”

In the *Matter of Heller, Hirsh & Co., Bankrupt*, 43 A. B. R. 525 (2nd Cir., 248 Fed. 208), it was held that the trustee in bankruptcy was not liable for income tax and the opinion of the Referee quoted by the Court in its decision is in part as follows (page 528):

“The language used in subdivision (c) shows that the subdivision was not intended by Congress to

apply in the case of receivers or trustees in bankruptcy or assignees who merely marshalled and distributed the assets of an insolvent corporation among its creditors.

“In terms subdivision (c) applies only in cases where receivers or trustees in bankruptcy or assignees ‘are operating the property or business of corporations’ and thus may be in the receipt of a ‘net income’ as defined in the prior sections of the Act. I regard the quoted words as of marked significance.

“To my mind the subdivision was inserted in the Act to meet the specified case of the profitable operation of the business of a corporation by the officers mentioned; for instance, the operation of the business of a railroad corporation by receivers or the operation of the business of a manufacturing corporation by a trustee in bankruptcy, etc., etc.

“In either of such cases it is quite possible that the operation of the business might result in a net income, a result which Congress sought very properly to reach; see *Scott v. Western Pacific R. R. Co.*, 246 Fed. Rep. 545, (C. C. A., 9th Circuit), (1917), page 548. I repeat my conviction that enacting subdivision (c) Congress had in mind the definite case so aptly described by the language used, and not the case of the officers mentioned when acting merely as liquidators.”

Internal Revenue Department office decision No. 884, reported in Cumulative Bulletin No. 4, page 309, provides in part as follows:

“Article 622, Regulations 45, which provides that ‘receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income

for such corporations on Form 1120, covering such year or part of a year during which they are in control * * *,’ refers specifically to receivers, trustees or assignees who are operating the property or business of corporations, and it has been held that where trustees in liquidation are merely engaged in marshalling, selling and distributing the assets of a corporation they are not operating the property or business of the corporation within the contemplation of the article mentioned.”

We proceed to a consideration of the transactions had by the Trustee in the light of the foregoing authorities. Such transactions may be briefly catalogued as follows:

1. Sales of real and personal properties.
2. The renting of improved and unimproved properties pending sale thereof.
3. Making necessary repairs to preserve properties, including work necessary to protect from hazards of fire and flood.
4. Negotiation and execution of oil and gas leases.
5. Negotiation and execution of agreement with City of Long Beach pending the termination of title disputes.
6. Granting of easements to public corporations.
7. Negotiation and execution of contract with Security-First National Bank of Los Angeles providing for liquidation of its secured debt and sale of properties held by it as security therefor.

As hereinbefore indicated the Bankruptcy Act itself provides that the Trustee is to collect, preserve and liqui-

date the property and assets of the bankrupt in order that the proceeds thereof may be made available to the creditors. This is his normal function as such Trustee. This liquidation, however, is to be made as expeditiously as possible compatible with the best interests of the parties. It is evident that Mr. Metcalf as such Trustee has merely performed the normal and regular duties imposed upon him by law, to wit, the preservation of the assets, the collection and liquidation thereof as expeditiously as the best interests of the parties require. None of the transactions had by him were intended to or were in fact in furtherance of business theretofore carried on by the corporation. True it is that a part of the business the corporation formerly engaged in was that of selling real estate. However, in addition thereto it was engaged in the business of buying, subdividing and improving the real estate before sale and acting as an agent or broker for the sale of real estate owned by others. None of these particular functions were exercised by the Trustee except only those of preserving the property pending sale, collecting the proceeds of rental of such properties pending sale or liquidation, and liquidating the properties as rapidly as was compatible to the best interests of the parties concerned. The functions so exercised by him, however, were as noted those normally imposed upon every Trustee in Bankruptcy.

Congress obviously in passing Section 52 (a) of the Internal Revenue Act and its predecessors did not intend to subject the Trustee to the payment of income tax upon his receipts where he was merely exercising these normal functions or duties imposed by the Bankruptcy Act upon the Trustee. Had it so intended it would have been a

simple matter to have expressly provided that the Trustee would be subject to an income tax upon all transactions had by him as such Trustee. Instead it provided that he should be liable only in the event he was operating the business or properties of the corporation. Congress is presumed to have had in mind the provisions of the Bankruptcy Act which gave to the Court jurisdiction to authorize the Trustee to carry on the business, and it seems to us to be obvious that Congress intended that the Trustee would be liable only in those instances where the Court had authorized the Trustee to carry on the business of the corporation, and pursuant to that authority the Trustee did in fact so carry on and conduct the business which was prior to bankruptcy engaged in by the corporation.

The unsoundness of the Government's position in the instant matter is emphasized by the following statement appearing on page 21 of its brief, to wit:

“Even if the trustee had not engaged in leasing, managing and renting the properties but had merely realized income from the sale of the assets, he would be subject to the tax.”

In effect the Government contends that if a sale by a Trustee in Bankruptcy of a parcel of real property was had for \$100,000.00, and the cost to the bankrupt of the property sold was only \$50,000.00, the Trustee would be liable for a tax on \$50,000.00. Obviously there is no merit to such a contention, for if such was the law then all trustees would be liable to a tax regardless of whether or not they were operating the business or property of the bankrupt corporation. Such is not the law, however, and the exercise of the normal duties of a Trustee does not subject the Trustee to a tax regardless of the amount

of money he receives as a result of the performance of his duties as such Trustee.

Some stress is placed by the Government upon the fact that the Trustee has collected rents from some properties. It must be observed in this connection that such rentals were collected only pending a sale of the property. Certainly the Trustee cannot be charged with a tax merely because he exercises good judgment and collects such rentals as he can pending his being able to sell the property. Every Trustee is required by the very nature of his office to do likewise.

The Government has emphasized in its brief the fact that the Trustee entered into a lease for the development of such oil and gas as might underlie a portion of the property of the estate. We think that this was obviously the exercise upon the part of the Trustee of the duty imposed upon him to recover, take possession of and reduce to money all assets or potential assets. It is said in *Remington on Bankruptcy*, Volume 2 (4th Edition), page 689, that:

“No order to collect the assets is necessary, for it is the trustee’s duty to search for and try to bring in everything he believes to be assets.”

The findings hereinbefore set forth disclose that there were no funds available to the Trustee with which to undertake the necessary drilling operations, but oil was believed to underlie the property. Other wells had been drilled and were producing upon adjacent property. There was danger that if drilling operations were not undertaken promptly that any oil that might underlie this property would be drained by others. *The oil was an asset if it could be captured and reduced to possession.* The only

feasible, practical method under the circumstances was to lease the property to one who would go upon the same and undertake to extract such oil as might be found; with the approval of the Court this was done. *It resulted in the preservation of an asset of the estate and the reduction of that asset to money.* For the lessee's services in drilling the well and capturing and reducing to possession the asset, to wit, the oil and gas, it was permitted by the terms of the lease to retain the oil and gas so extracted and pay to the Trustee a royalty or percentage of the proceeds obtained from the sale thereof. It is true that under the terms of the lease the Trustee might take possession of a portion of the oil, and to store it or otherwise dispose of it, but this option so granted to the Trustee was never exercised. The Trustee has actually only received oil royalties in accordance with the lease. Such royalties have been paid by the Trustee to Security-First National Bank of Los Angeles to apply on taxes, interest and principal of its secured debt. We do not see that it makes any difference whether the Trustee could or could not have taken possession of a portion of the oil produced. The action of the Trustee in entering into the lease was one prompted by common sense and in the furtherance of the duty imposed upon him by the nature of his office.

The Government has likewise emphasized in its brief the fact that the Trustee attempted to so conduct his sales of assets of the estate as to take advantage of favorable market conditions. A provision of the Bankruptcy Act hereinbefore quoted expressly provides that the liquidation by the Trustee is to be had as expeditiously as possible *compatible with the best interests of the parties.*

The Trustee is required to obtain the most from the property that he can. The interests of the creditors are not to be served by hasty, ill-timed sales. The Trustee was required to obtain a fair amount for the property, and to so conduct his selling program as to take advantage of favorable market conditions.

The contract with the Security-First National Bank of Los Angeles for liquidation of its secured indebtedness in installments over a period of years, and the sale of the property held by it as security was in furtherance of this duty of the Trustee to gain from that property all that was possible to be obtained for the benefit of the unsecured creditors, whose claims exceed \$295,000.00. [R. 53.] The more rapidly the debt of the bank could be reduced the sooner unsecured creditors would expect to receive something on their claims, but the necessity of receiving a fair and adequate return from such sales could not be sacrificed for rapidity in reduction of the debt of the secured creditor. The greater the price obtained from sales of portions of the property the more chance there is of the unsecured creditors obtaining payment on their claims. A forced sale of the great number of properties involved in order to pay the debt of the secured creditors was not in the interest of unsecured creditors. Obviously therefore, the contract was just another example of the exercise of the Trustee of his normal duties and functions. This contract was approved by the Referee, the District Court and by this Court. See *In re F. P. Newport Corporation, Ltd.*, 98 Fed. (2d) 453.

Again and at the risk of repetition we repeat—that the transactions had by the Trustee and disclosed by the record herein were had pursuant to and in the exercise of

his normal duties as Trustee, and that in the exercise of such duties he was not operating the property or business theretofore operated by the corporation and there is no proof in the record in this case that the Trustee is obligated under the provisions of Section 52 (a) of the Internal Revenue Code for the payment of any tax upon his receipts as such Trustee.

In the *Matter of Owl Drug Co., Bankrupt*, 21 Fed. Supp. 907, 37-2 U. S. T. C. 10,376 and 10,377, it is said:

“Since 1916 the yearly Revenue Acts have contained provisions identical with the one under consideration. Their object is to reach a new source of income taxation, not reached before. But income from that source is not available, unless all the conditions imposed by the section co-exist. The most fundamental one is that the receiver, trustee in bankruptcy, or assignee must be ‘operating the property or business’ of a corporation, and all of it.

“To ‘operate’ means *to put into, or to continue in operation or activity, to manage, to conduct, to carry out or through*. This is both the ordinary and the legal definition of the word. (See: Webster’s New International Dictionary; 6 Words and Phrases (1st series) (1904) pp. 4989 et seq.; 3 idem (2nd series) (1914) pp. 743 et seq.; 5 idem (3rd series) (1920) pp. 629 et seq.; 2 Idem (4th series) (1933) pp. 864 et seq. The new Shorter Oxford English Dictionary defines it as follows:

“‘To direct the working of, to manage, conduct, work (a railway business, etc.); to carry out, direct to an end (an undertaking, etc.); chiefly U. S. 1880.’ (Volume II, p. 1374.)

“The operation of a business implies its conduct and management not sporadically, but continuously

over a definite period of time, with one aim,—*profit making*. Repeatedly, when deductions have been claimed by a taxpayer for losses resulting from the claimed 'operation' of a trade or business during the taxable year, under the provisions of the various Revenue statutes, allowing such deductions, the Courts have held that the requirement of continuity and assiduity had to be satisfied. (See: *Bedell v. Commissioner of Internal Revenue* (C. C. A. 2, 1929), 30 Fed. (2) 622; *Schuette v. Anderson* (1932) (C. C. A. 2), 55 Fed. (2d) 902; and see: *State of Iowa ex rel. Gibson v. American Bonding & Casualty Co.* (D. C. Iowa, 1937), as yet unreported.)

"The business of a corporation is 'that which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' (*Flint v. Stone Tracy Co.* (1910), 220 U. S. 107, 171.) Said the Court in *Von Baumbach v. Sargent Land Co.* (1917), 242 U. S. 502, 517:

" 'It is evident, from what this court has said in dealing with the former cases, that the decision in each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails and doing only the acts necessary to continue the status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit and gain and such activities as are essential to those purposes.' "

See also:

In re Doehler Die Casting Co., Inc., et al. v. The Meadows Mfg. Co. (S. D. Ill.), U. S. T. C. 1938 Suppl., page 10,491.

Discussion of Authorities Cited by the Government.

A number of decisions of the courts have been cited in the Government's brief in support of its position. An examination of these authorities discloses that in no instance was a Trustee in Bankruptcy involved and in no instance did the Court construe Section 52 (a) of the Internal Revenue Act in relation to transactions had by a trustee in bankruptcy.

The decisions so referred to by the Government may be roughly classified as follows:

1. Those construing the act in relation to transactions had by a receiver.
2. Those construing the act in relation to transactions had by a Trustee under private trusts.
3. Those construing the Capital Stock Tax Act.
4. Those construing the general provisions of the Revenue Act imposing tax upon corporations.

We do not believe that any useful purpose would be served by a lengthy discussion of the authorities cited by the Government, but in an effort to be of some assistance to the Court we briefly refer to a few of the decisions cited.

Illustrative of the cases cited under the classification 3 above are those cited on page 13 of the Government's brief including the case of *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 61 Law Ed. 460. The Supreme Court in its decision in this matter had this to say at page 468:

"It is evident, from what this court has said in dealing with the former cases, that the decision in

each instance must depend upon the particular facts before the court. The fair test to be derived from a consideration of all of them is between a corporation which has reduced its activities to the owning and holding of property and the distribution of its avails, and doing only the acts necessary to continue that status, and one which is still active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain, and such activities as are essential to those purposes."

The case of *Heiner v. Mellon*, 304 U. S. 271, does not involve a Trustee in Bankruptcy but an ordinary taxpayer who liquidated assets, and during the course of such liquidation he made a profit. Obviously a tax would be payable on such profit.

The case of *Buckley v. Commissioner*, 66 Fed. (2d) 394, involved only the question of whether or not an income tax was payable upon income received from a fund held for the benefit of a private person.

We have no quarrel with such decisions as represented by *Swarts v. Hammer*, 194 U. S. 441, holding that property in the possession of the Trustee in Bankruptcy is subject to a state property tax.

The case of *Louisville Property Co. v. Commissioner*, 47 B. T. A. No. 6, is not at all helpful for in that case it appears that in 1919 the Court of Appeals of Kentucky ordered that a receiver be appointed for the Louisville Property Co., a Kentucky corporation, for the purpose of paying up its debts and winding up its affairs. Instead of a receiver being appointed the corporation in 1919 assigned all of its assets to a trust company in trust for

the payment of its debts, expenses of administration and the distribution of the remainder, if any, to the stockholders of the corporation. In 1935 the trust company resigned and one Williams was appointed successor trustee or assignee to carry out the terms of the 1919 trust. Williams during the course of his operations carried on similar transactions theretofore carried on by the corporation except that he did not acquire new properties but pending the sale and disposition of the properties he proceeded to operate essentially in the same manner as the corporation. The Court held that he was operating the property and business of the corporation within the meaning of Section 52 of the Revenue Act of 1934 and 1936. We have no quarrel with the decision under the facts therein involved, but it is entirely foreign to the transactions had in the instant cause by Mr. Metcalf *as Trustee in Bankruptcy*.

The case of *State v. American Bonding & Cas. Co.*, 225 Iowa 638, 281 Northwestern 172, is not helpful in our opinion, since there a receiver had been appointed by the State Court. Claims presented in the receivership proceedings were large, involved and quite complicated, necessitating some litigation in order to dispose of them. In the meantime the receiver had taken possession of the assets which consisted of bonds, mortgages and securities. He sold some, reinvested the proceeds in other securities, foreclosed mortgages, invested some of the proceeds in other securities, and where the property had been acquired under the foreclosure he proceeded to manage that property. The transactions thus had by the receiver were to a large extent the same or similar to those carried on by the corporation itself prior to the receivership.

The case of *U. S. v. Trust No. B1.35*, 107 Fed. (2d) 22, involved a trust organized in corporate form, for the management of oil companies' lands; the Trustee acting under the direction of the advisory board not only handled existing leases but in order to *increase profits* made new leases and new agreements with former operators concerning production, and stored and transported oil for a special compensation. The Court held that the business trust was carrying on the very business for which it was organized, to wit, the transaction of business for profit.

Another similar case is *Kettleman Hills R. S. No. 1 v. Commissioner*, 116 Fed. (2d) 382.

The case of *U. S. v. Rayburn*, 91 Fed. (2d) 162, involved a private trust created to hold land, collect rents and profits thereof and sell the same when a favorable price could be obtained, and distribute profits thereof to former stockholders.

Several cases are cited by the Government wherein the Courts have held that under the facts involved in each particular decision the corporation was carrying on or doing business within the meaning of Section 105 (a) of the Revenue Act of 1935, imposing a capital stock tax. We have no quarrel with those decisions, but do not believe that decisions determining whether or not, under a particular set of facts, a corporation is subject to a capital stock tax are helpful in determining the issue here involved.

Trustees in Bankruptcy are not subject to the Capital Stock Tax Act or to the Excess Profits Tax Act. See *Reinecke v. Gardner*, 72 Law Ed. 866.

Many decisions can be cited wherein the Courts have held that transactions had by a corporation of a character similar to those had by the Trustee in the instant matter did not constitute carrying on business by such corporation under the Capital Stock Tax Act. We refer to a few of those decisions as follows: In the *Estate of Isaac G. Johnson v. The United States* (Court of Claims), 37 Fed. Supp. 617, it was held that a realty corporation organized to take over and manage the realty assets of a decedent was not doing business within the provisions of the Capital Stock Tax Act where it confined its activities to owning, holding and preserving its property and the collection of the income therefrom with the ultimate intent to dispose of the properties and distribute the avails and liquidate as rapidly as seemed advantageous. To like effect see *Western Shore Lumber Company v. U. S.* (N D. of Calif.), 41-2 U. S. T. C. 10,586; *McCoach v. Minehill & S. R. Co.*, 57 Law Ed. 842; *Scars, et al. Trustee v. Hassett*, 40-1 U. S. T. C. 10,225; *Nashua & Lowell R. R. Co. v. Welch*, 40-1 U. S. T. C. 9,776; *Zonne v. Minneapolis Syndicate*, 55 Law Ed. 428.

The Government has emphasized Treasury Regulations 101, Article 52-2 and Treasury Regulations 103, Section 19.52-2. It is our position that these regulations fully support our contention for it will be observed that the first portion of the regulations provides that "receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must

make returns of income *for such corporations.*” The balance of the regulations relates only to a receiver, no mention being made therein of a trustee in bankruptcy. Obviously if any income tax is due by a trustee in bankruptcy it must be by virtue of his operations of the property or business of the corporation. It is not income of the corporation in any sense of the word. It is his income only, and the regulations recognize a distinction between a Trustee in Bankruptcy and a receiver, for the regulations provide that if a receiver has full custody of or control over a business or property of a corporation he shall be deemed to be operating such business or properties, even though he be only marshalling, selling and disposing of its assets for the purpose of liquidation. There may be propriety in this regulation as directed to a receiver for a receiver has no title to the property administered by him; the property remains at all times the property of the corporation. On the contrary a Trustee in Bankruptcy acquires title. He necessarily assumes full control over the assets, and the function imposed upon him by law is to preserve, marshal and liquidate, but Congress made no provision for the exaction of a tax as a result of such transactions by a Trustee in Bankruptcy. The regulations themselves recognize this fact, and the wording of the regulations is an acknowledgment that no tax is payable by a Trustee in Bankruptcy except in the special instance where he operates the property or business formerly owned by a corporation pursuant to an order of Court.

In conclusion, we direct the Court's attention to the fact that all funds received by the Trustee in Bankruptcy were paid by him, with the exception of those used in paying expenses of administration, to the secured creditor to apply on its debt. [R. 34-35.] Since said creditor is a national bank it has undoubtedly been required to write off most of its obligations [it filed an unsecured claim for \$500,000.00, R. 32], and payments made to it are probably taxable to it as a "recovery on bad debts."

We respectfully submit that the judgment of the District Court approving and affirming the Referee in Bankruptcy's findings and order disallowing the claim of the Government should be affirmed by this Court.

BAILIE, TURNER & LAKE,

By ALLEN T. LYNCH,

NORMAN A. BAILIE,

ALLEN T. LYNCH,

*Attorneys for H. F. Metcalf, as Trustee in Bankruptcy
of the Estate of F. P. Newport Corporation, Ltd.,
a Corporation, Bankrupt, Appellee.*

United States
Circuit Court of Appeals
For the Ninth Circuit.

BYRON J. DOLPHIN, sometimes known as B. J.
DOLPHIN and DOLPHIN'S NATURAL
BARKS,

Appellant,

vs.

GEORGE E. STARR, United States Postmaster at
Seattle, King County, Washington,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Western District of Washington,
Northern Division.

JUN 24 1942

PAUL P. O'BRIEN,
CLERK

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

EDGAR S. HADLEY, Esq.,
802 Lowman Building,
Seattle, Washington,
Attorney for Appellant.

J. CHARLES DENNIS, Esq.,
United States Attorney,
1012 U. S. Court House,
Seattle, Washington,
Attorney for Appellee.

GERALD SHUCKLIN, Esq.,
Assistant United States Attorney,
1012 U. S. Court House,
Seattle, Washington,
Attorney for Appellee.*

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Western District of Washington, Northern
Division

No. 429

BYRON J. DOLPHIN, sometimes known as B. J.
DOLPHIN, and DOLPHIN'S NATURAL
BARKS,

Plaintiff,

vs.

GEORGE E. STARR, United States Postmaster at
Seattle, King County, Washington,
Defendant.

COMPLAINT

Comes now the Plaintiff, and for cause of action
against the Defendant, alleges as follows:

I.

That Byron J. Dolphin, sometimes known as B. J. Dolphin, the manufacturer of Dolphin's Natural Barks, is a native born citizen of the United States of America and a resident and citizen of the State of Washington, residing at Seattle, King County, Washington.

II.

That some years last past, the Plaintiff discovered a formula for the treatment of diseases of the eye, which has been known as Dolphin's Natural Barks, and since the discovery thereof, he has been engaged in the manufacture and sale thereof in the State of

Washington, and in the United States of America, and in connection with the sale thereof has availed himself of the opportunity granted him as a citizen of the United States, of using the United States mails, and the business of the manufacture and sale of Dolphin's Natural Barks has become and now is of great consequence to the people of the United States.

III.

That on or about May 21, 1941, the Plaintiff received from the Postmaster General of the United States, through his Solicitor, a Memorandum of charges, charging the Plaintiff with the fraudulent [2] use of the United States mails in the sale and advertising of Dolphin's Natural Barks; and that said order cited Byron J. Dolphin to appear and show cause, at Washington, D. C., why a fraud order should not be issued against him.

IV.

That the Plaintiff immediately caused, through his attorney, a request to be served upon the Post Office Department, requesting that the matter be transferred to Seattle, Washington, where he would have the privilege of making a proper defense to said fraud charges; that his request for a transfer of said hearing was promptly denied, and thereafter this Plaintiff made reply to said citation denying any charge of fraud on his part in the sale of Dolphin's Natural Barks, which is a liquid remedy derived from natural barks, and forwarded

to said Department numerous affidavits and letters of persons who had used Dolphin's Natural Barks, and also made showing that he was unable to attend the hearing at Washington, D. C.

V.

That apparently on June 12, 1941, the hearing was held at Washington, D. C., and a report thereof was forwarded to the Plaintiff, who promptly denied the statements of the Post Office Inspector and others, and filed additional testimonials from divers persons who had used said remedy, and denied further that he had used any advertisement that was unjustified or set forth any false statements as to the value of the eye remedy.

VI.

That thereafter, as appears, on September 5, 1941, Vincent M. Miles, as Solicitor, made findings of fact and conclusions, a copy of which is attached hereto, made a part hereof and marked Exhibit "A"; that thereupon, Frank C. Walker, the Postmaster General of the United States of America, prepared Fraud Order No. 16215, [3] and the same was forwarded to the attorney for this Plaintiff; that a copy of said order is attached hereto, made a part hereof, and marked Exhibit "B".

VII.

That by said order the Plaintiff was refused the right to use the United States mails either in the business of the sale of his eye remedy or to use the

same as a private citizen in private mail, and the Postmaster at Seattle, Washington, was directed to seize all mails addressed to Byron J. Dolphin or B. J. Dolphin, or to Dolphin's Natural Barks, and to mark the same, "Fraudulent: Mail to this address returned by order of Postmaster General", and if said letters could not be returned to the senders thereof, that they should be returned to the dead letter office, marked "Fraudulent."

VIII.

That by reason of said order, George E. Starr, the Postmaster at Seattle, Washington, has seized all mails addressed to Byron J. Dolphin, B. J. Dolphin or Dolphin's Natural Barks and is holding the same or has returned the same according to said order, and this Plaintiff is suffering irreparable injury thereby.

IX.

That the findings of the Solicitor for the Post Office Department and the order of the Postmaster General based thereon, are unlawful and not based upon facts and are arbitrary and capricious, as is shown by the findings of the Solicitor upon which said order was based; that the Solicitor quoted from purported pamphlets, said quotations appearing on page 3 of his said findings, and on page 4 thereof, and states the same to be facts, and the testimony of the government agent who offered the circulars in evidence stated that he had received the said circular through the mails; that in truth and fact

the circular referred to has not been used [4] by the Plaintiff for more than a year prior to the date of the entry of said order, and the circular received by the Post Office Inspector who testified, was handed to him in person just prior to the commencement of this action by the Plaintiff, who informed him that the circular was not in use, although the circular sets forth facts and no false statements.

X.

That the testimony of the medical doctor as is quoted in Exhibit "A" appearing on page 6, stated that among other things the Dolphin's eye drops were said to be able to cure cancer; that no such statement was ever made in any circular and does not appear in any circular attached to the record of testimony; that in addition thereto, it was stated that the remedy would not aid astigmatism, but statements of persons having been relieved of astigmatism by the eye remedy manufactured by the Plaintiff were forwarded to the Department.

XI.

That in addition thereto, the Solicitor refused to take into consideration or consider the affidavit and statements of persons who had been relieved and cured of serious eye conditions by reason of Dolphin's eye remedy; that he also refused to consider the testimony of chiropractors and naturopaths and only considered a statement from a doctor, who, without doubt, had special interest in the preven-

tion of the sale of the eye remedy, and he stated that they were lay persons and not entitled to consideration.

XII.

That Plaintiff has never at any time made any fraudulent statement with regard to his eye remedy and has never advocated that it would do anything that persons who had used it did not claim it had done for them; that the Plaintiff has at all times cooperated with and followed the instructions as given him by [5] the United States Food and Drug Administration, and has attempted at all times to and has complied with all laws of the United States of America; that the said remedy has been analyzed by the Pure Food and Drug Administration of the State of Washington, and pronounced harmless; that Plaintiff has always sought, and followed, any suggestions of the United States Food and Drug Administration, and has never refused to comply with any order, contrary to the statements made by the Solicitor in his findings.

XIII.

That the entire proceeding before the Solicitor was unfair and did not conform to the true facts, and by reason thereof, this Plaintiff is being deprived of his constitutional rights to the use of the mails and to the distribution of a remedy that is well-known to be of great benefit; that the acts of the Solicitor and of all the witnesses were capricious and arbitrary and intended solely to destroy

the name of the Plaintiff and his business, and unless restrained, the order of the Postmaster General now in force by the Postmaster at Seattle, the Plaintiff's business will be ruined, and the Plaintiff has no plain, speedy or adequate remedy at law; that the entire proceeding is unconstitutional and in violation of the rights of Plaintiff.

Wherefore, Plaintiff prays that the proceedings of the Solicitor and of the Postmaster General be reviewed, and that he have the privilege of a fair and just hearing, and that the Postmaster, George E. Starr, of Seattle, Washington, be restrained from in any manner enforcing the order of the Postmaster General, under date of September 17, 1941, and that the Plaintiff have such other and further relief as to the Court shall seem just and equitable.

EDGAR S. HADLEY

Attorney for the Plaintiff [8]

United States of America,
Western District of Washington,
Northern Division—ss.

Byron J. Dolphin, also known as B. J. Dolphin, the manufacturer of Dolphin's Natural Barks, being first duly sworn on oath, deposes and says: That he is the Plaintiff above named; that he has read the within and foregoing Complaint, knows the contents thereof and believes the same to be true.

BYRON J. DOLPHIN.

Subscribed and sworn to before me this 10th day of October, 1941.

[Seal] EDGAR S. HADLEY,

Notary Public in and for the State of Washington,
residing at Seattle. [7]

EXHIBIT A

Post Office Department
Office of the Solicitor
Washington

September 5, 1941.

In the Matter of Charges That DOLPHIN'S NATURAL BARKS, BYRON J. DOLPHIN, and B. J. DOLPHIN, at Seattle, Washington, are engaged in conducting a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises, in violation of 39 U. S. Code 259 and 732 (Sections 3929 and 4041 of the Revised Statutes, as amended).

MEMORANDUM FOR THE POSTMASTER
GENERAL EMBODYING A FINDING OF
FACT AND RECOMMENDING THE ISSU-
ANCE OF A FRAUD ORDER.

Under date of May 17, 1941, the above-named concern and party were forwarded copy of a memorandum of charges on file in this office and called

upon to show cause on June 12, 1941, why a fraud order should not be issued against him. The citation was delivered to Mr. Byron J. Dolphin, the respondent, on May 21, 1941. On June 2, 1941, Mr. Edgar S. Hadley, Attorney at Law, of Seattle, Washington, addressed a letter to this office with which he transmitted the answer of the respondent and also requested that the matter be transferred to Seattle, Washington, for hearing at that point. He was promptly advised that it was not practicable to transfer the hearing as requested. With the respondent's answer there was also submitted as exhibits a number of statements from users of the product involved in this case containing expressions of satisfaction with the product. The hearing in this [8] matter was held on June 12, 1941, at which there appeared and testified under oath the post office inspector who investigated the case, a qualified government chemist who analyzed the product involved, and a doctor of medicine. The transcript of the testimony taken at this hearing was subsequently submitted to the respondent through his attorney and on August 8, 1941, an affidavit by the respondent and certain exhibits for consideration in connection with the record were submitted by respondent's counsel. The stenographic transcript of the testimony taken at this hearing, the evidence received at the hearing, the answer of the respondent, and various exhibits and letters submitted by him, together with the supplemental document concerning the transcript submitted by the respondent,

have all been carefully examined and are submitted herewith, and are, by this reference, hereby made a part hereof.

From this examination I find the facts to be as follows:

Under the names set forth in the caption of this memorandum, Mr. Byron J. Dolphin is engaged in the advertisement and sale through the mails of a preparation called "Dolphin's Natural Barks" as a treatment for various conditions and diseases of the eye. The memorandum of charges served upon the respondent alleges that the following false and fraudulent pretenses, representations and promises have been made in offering said product for sale through the mails: [9]

That the said preparation, when used as directed, will cure ailments of the eye "such as" pterygium, "scums, growths, astigmatism," and will be beneficial in cases of cataracts;

That the said preparation, when used as directed, will cure "granulated lids and ulcers" of the eye;

That the use of the said preparation as directed will restore the sight to persons who are practically blind;

That the use of the said preparation as directed will "keep" the eyes of users "well and healthy" regardless of the age or physical condition of the user; and

That all users of the said preparation as directed will obtain the same or similar results

as those described in the alleged testimonials employed in the advertising literature of the said concern and party.

According to the testimony of the post office inspector who investigated this matter, the mail order enterprise was started in September 1938, by Mr. Dolphin, and is being continued at the present time. Advertisements are placed in various publications circulating through the mails soliciting remittances as the purchase price for the product. A number of such advertisements were received in evidence, one of which (Government Exhibit 1-C) reads as follows:

Another Great Discovery

Dolphin's natural barks, the wonderful drops for the eye. They restored my sight. I was practically blind for years with granulated lids and ulcers. Ask your health food store, or write us.

DOLPHIN'S NATURAL BARKS

318-102nd S.W.

Seattle, Wash.

Persons who make inquiry as a result of the foregoing and similar advertisements are sent printed circular matter containing statements [10] concerning the product and also a number of alleged testimonial letters from users thereof. One of these circulars received through the mails on May 23, 1941, is entitled "Guide to Sight" and was received in evidence as Government Exhibit 5-E. Among other things, this circular contains the following statements:

FRIENDS

These few lines are printed and circulated for the benefit of those who are so unfortunate as to be afflicted with disease or deformity of the eyes.* If it should come into the hands of one not so afflicted, please pass it on for as you know, we should do unto others as we would have them do unto us.

This information is to inform you that many ailments of the eye, if not all, can be cured or helped by the Cell Food Method.* For years I had granulated lids and ulcers at the same time. The doctors cauterized them with carbolic acid and nearly ruined them for good, in so much they wanted to take one of them out. I refused and in a miraculous way the Good Lord showed me how to discover an eye drop that would cure me, made from herbs and barks, hence the name Dolphin's Natural Barks, the wonderful Cell Food Drops. It has also cured other ailments such as Petrigum Sties, Scums, Growth, Astigmatism, Weak Watery eyes and it has been beneficial in cases of cataracts.* Of course, under the law I am forbidden to say what it will do, notwithstanding the fact that many are being relieved if not cured entirely.*

So if you are suffering, get in touch with me at once and keep the two little friends you have well and healthy,* for it is a life of misery without them.

*Underscoring supplied.

Alleged testimonial letters printed in this circular report that through its use the product has completely cleared up "bloody weblike growth" over the eye and restored it to "perfect condition"; restored eyes afflicted with "severe eye trouble" to normal; "entirely" "cured" "a growth on the inside of the upper lid" of the eyes; cured "granulated [11] eyelids"; cured astigmatism; kept the eyes "well and healthy" and "perfect"; relieved "cataract"; strengthened the sight so that a person could read without glasses; restored a person "very nearly blind" to good sight, and accomplished other similar results.

According to the sworn testimony of the government chemist who analyzed "Dolphin's Natural Barks", it consists of an aqueous liquid containing traces of iron, calcium, magnesium, aluminum, sodium and potassium, and nothing else. Despite the claim of the promoter on the label of his product that it is manufactured from "tamarack bark" and "oak bark", no tannin, which is present in all extracts from the barks of trees, was found in the product by the chemist. The directions for use of the product are as follows:

Two to five drops in eyes, night and morning.

Caution: If eyes are in bad condition they may sting. Continue use of drops and sting will disappear.

In severe cases the product is to be placed in the eye "three times a day". No liquor is to be used during treatment.

According to the testimony of the physician at the hearing, "Dolphin's Natural Barks" contains ingredients which are well known and have been used for various purposes in varying strengths by the medical profession, and their limitations have been definitely established. [12]

The medical testimony shows that diseases and conditions of the eye are due to a number of causes and require individualized diagnosis and treatment. Some of the diseases of the eye are irreparable by any method of treatment known to the medical profession, including surgery. In some instances certain progressive conditions may be eliminated by surgery, which otherwise might continue until complete loss of sight occurs. Certain malignant tumorous growths, which not uncommonly affect the eye, may, if not promptly and properly treated, even result in loss of life, according to the testimony of the medical expert. Pterygium, one of the conditions mentioned in respondent's advertising matter, is a growth coming up over the cornea, generally from the inner side of the eyeball. "Growths" also mentioned in the advertising matter include tumors, deep ulcers, cancer, sarcoma, as well as pterygium. The only known method of removing such growths, according to the medical testimony, is by surgery.

Astigmatism is a condition in which the eyeball is bent or assumes an abnormal curvature, particularly of the anterior portion or cornea. The cause of this condition is unknown and changes with the advance of age. The proper treatment consists in

giving glasses to offset the improper curvature of the cornea so that the light rays focus upon the proper area in the retina of the eye. The application of "Dolphin's Natural Barks" to the eyes in accordance with the directions of the promoter would, according to the testimony of the physician in this [13] case, have no effect whatsoever upon the sight of persons suffering from astigmatism. Granulated lids or trachoma is an infectious disease of the eye due to a virus. This condition is cured in most cases by the use of sulfanilimide, according to the medical testimony. Prior to the discovery of sulfanilimide, trachoma usually ran a progressive course, sometimes clearing up on its own accord in the course of years, and at other times resulting in blindness or partial blindness. Systematic diseases such as diabetes, syphilis and others, frequently cause decreased vision and dimness of sight. Certain dietary insufficiencies frequently cause a deficiency of sight and proper treatment of the same necessitates the administration of the missing vitamins or minerals in the diet. Diminution of sight due to systemic diseases requires treatment of the systemic disease, following which normal vision often results. According to the medical testimony, no systemic disease or local condition which results in defective eyesight would be altered in any manner by use of "Dolphin's Natural Barks". Aside from some slight antiseptic and astringent effects, the product sold in this case would not have any practical effects in the treatment of infections of the

external area of the eyeball. Certain minor conditions of the eye may be alleviated or eliminated through the natural processes of the body without treatment of any kind. Any diseased condition of the eye requiring treatment would not be materially benefited by use of "Dolphin's Natural Barks" as directed. The testimony before me shows that [14] this preparation will not cure ailments of the eye such as pterygium, scums, growths, astigmatism, nor will it be beneficial in cases of cataracts. The testimony before me further shows that the product will not cure granulated lids and ulcers of the eye as claimed, nor will it restore sight to persons who are practically blind. Aside from the slight anti-septic and astringent effects, the preparation will not keep the eyes of users "well and healthy" as promised. Furthermore, the evidence shows that the alleged beneficial results described in the testimonials employed in the advertising matter in this scheme will not and cannot be truthfully promised users of the product.

The promoter of this enterprise has been repeatedly warned over a period of years by the United States Food and Drug Administration that the claims made by him could not be substantiated by the facts and that the printing of such claims on the label would result in his product being misbranded. Despite these repeated warnings, the promoter nevertheless continued the use of such representations.

The affidavits submitted by the respondent from users of the product are, with one exception, all

from lay persons, chiropractors or naturopaths. The statement from the only doctor of medicine submitted recommends use of the product "in all minor eye troubles". The reports of lay users, chiropractors and naturopaths can be given little, if any, weight since the writers thereof are not qualified by training and [15] experience to diagnose diseases and conditions of the eye and prescribe therefor, nor are such persons qualified to testify as to the therapeutic effects of drugs. Mr. Dolphin is neither a physician, chemist nor pharmacist and no person with those qualifications is connected with the enterprise. He claims to have discovered the product a number of years ago in an attempt to cure himself of ulcers and granulated eyelids. Prior to his entrance into this business he was engaged in the mercantile business and also worked in the flour mills in and around Minneapolis, Minnesota. This scheme is conducted from Mr. Dolphin's residence where he manufactures the product on an electric stove and strains it through several thicknesses of filter paper. The promoter wears eyeglasses in his daily life.

The evidence before me shows that the representations employed in the solicitation of money through the mails in this enterprise are false and fraudulent, and I so find.

I therefore recommend that a fraud order be issued against Dolphin's Natural Barks, Byron J. Dolphin, B. J. Dolphin, and their officers and agents as such, at Seattle, Washington.

(Signed) VINCENT M. MILES,

Solicitor. [16]

EXHIBIT B

Post Office Department
Washington

Sep 17 1941

Order No. 16215

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that Dolphin's Natural Barks, Byron J. Dolphin, B. J. Dolphin, and their officers and agents as such, at Seattle, Washington, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of sections 259 and 732 of title 39, United States Code, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of September 5, 1941, and by authority vested in the Postmaster General by said laws the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern & parties and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern & parties to the postmasters at

the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered, or other matter, you are directed to send such letters and matter to the Division of Dead Letters with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

(Case No. 36640-F)

(Signed) FRANK C. WALKER

Postmaster General.

To the Postmaster.

Seattle, Washington. [17]

[Title of District Court and Cause.]

SUMMONS IN A CIVIL ACTION

To the above named Defendant:

You are hereby summoned and required to serve upon E. S. Hadley, plaintiff's attorney, whose address, 802 Lowman Bldg., Seattle, Washington, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If

you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal of Court] MILLARD P. THOMAS

Clerk of Court.

By C. R. FITZGERALD

Deputy Clerk.

Date: Oct. 14, 1941.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure. [18]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 14th day of October, 1941, I received the within summons together with complaint, at Seattle, Wash., and served same upon George E. Starr, Postmaster of the City of Seattle, Washington, October 23, 1941, by serving Emery T. Ringstad, Acting Postmaster of said City, George E. Starr being absent on vacation.

H. W. ALGEO

United States Marshal.

By PATRICK J. BRADLEY

Deputy United States Marshal.

Marshal's Fees

Travel\$.....

Service 2.00

2.00

Subscribed and sworn to before me, a _____,
this _____ day of _____ 19 ____.

[Seal] _____

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

[Endorsed]: Filed Oct. 27, 1941. [19]

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Edgar S. Hadley, being first duly sworn on oath, deposes and says: That he is the attorney of record for the above-named Plaintiff, Byron J. Dolphin, sometimes known as B. J. Dolphin, and Dolphin's Natural Barks; that on the 14th day of October, 1941, at Seattle, Washington, he duly mailed a copy of the Complaint as filed in this action, together with a copy of the Summons as issued by the Clerk of the District Court of the United States, Western District of Washington, Northern Division, to Frank C. Walker, Postmaster General of the United States of America, at his address at Washington, D. C.; that said Summons and Complaint was enclosed in an envelope properly addressed to the said Frank C. Walker, marked "Registered Mail" and deposited in the United States mail, with postage prepaid thereon.

EDGAR S. HADLEY.

Subscribed and sworn to before me this 14th day of October, 1941.

(Seal) LOUIS E. SHELA,
Notary Public in and for the State of Washington,
residing at Seattle. [20]

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant herein by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Gerald Shucklin, Assistant United States Attorney for said District, and moves the court to dismiss the above entitled action on the following grounds:

I.

Lack of jurisdiction over the subject matter.

II.

Lack of jurisdiction over the person.

III.

Improper venue.

IV.

Insufficiency of process.

V.

Insufficiency of service of process.

VI.

Failure to state a claim upon which relief can be granted.

J. CHARLES DENNIS,
United States Attorney.
GERALD SHUCKLIN,
Assistant United States
Attorney.

Received a copy of the within Motion to Dismiss
this 5th day of January, 1942.

EDGAR S. HADLEY,
Attorney for Plf.

[Endorsed]: Filed Jan. 13, 1942. [23]

United States District Court, Western District of
Washington, Northern Division.

No. 429

BYRON J. DOLPHIN, sometimes known as
B. J. Dolphin, and Dolphin's Natural Barks,
Plaintiff,

vs.

GEORGE E. STARR, United States Postmas-
ter at Seattle, King County, Washington,
Defendant.

ORDER OF DISMISSAL

The above cause having come on regularly for
hearing on the motion of the defendant herein to

dismiss the action on the grounds stated in the Motion on file herein on March 2d and on March 9th, 1942, the plaintiff being represented by his attorney Edgar S. Hadley, and the defendant by his attorneys J. Charles Dennis, United States Attorney, and Gerald Shucklin, Assistant United States Attorney, and it appearing to the Court that the acts alleged to have been done by George E. Starr, Postmaster at Seattle, Washington, were done at all times only pursuant to the directions and instructions of the Postmaster General of the United States of America under the terms of the "fraud order", and it further appearing to the Court that the Postmaster General of the United States is a necessary party, the Court hereby finds that there is a want of a necessary party hereto; now therefore, it is hereby

Ordered, Adjudged and Decreed that the motion to dismiss the action be, and the same is hereby granted and the said cause is hereby dismissed without costs to either party. [24]

To which plaintiff excepts—

Exception allowed.

Done in open court this 16th day of March, 1942.

JOHN C. BOWEN,

United States District Judge.

Presented by:

GERALD SHUCKLIN,

Asst. United States Attorney.

Approved as to form:

EDGAR S. HADLEY,

Attorney for Plaintiff

GERALD SHUCKLIN,

Asst. U. S. Atty.

[Endorsed]: Filed Mar. 16, 1942. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the Plaintiff, Byron J. Dolphin, sometimes known as B. J. Dolphin, and Dolphin's Natural Barks, by and through Edgar S. Hadley, his attorney, and hereby gives notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order signed and entered on the 16th day of March, 1942, by the above entitled Court, said order dismissing the action of the Plaintiff and denying his right to maintain said action.

Dated this 13th day of April, 1942.

EDGAR S. HADLEY,

Attorney for Plaintiff.

Copy received this 13th day of April, 1942.

J. CHARLES DENNIS,

U. S. Atty.

Attorney for Defendant.

[Endorsed]: Filed April 13, 1942. [26]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

The Court erred:

1. In sustaining the motion of the Defendant upon the ground that the Plaintiff could not maintain this action against the Defendant, George E. Starr.

2. The Court erred in holding that the Postmaster General of the United States was a necessary party to said action.

3. The Court erred in dismissing the Plaintiff's cause of action.

EDGAR S. HADLEY,
Attorney for Plaintiff.

Presented by:

EDGAR S. HADLEY,
Attorney for Plaintiff,
802 Lowman Building,
Seattle, Washington.

Received a copy of the within Assignments this
13th day of April, 1942.

J. CHARLES DENNIS,
U. S. Atty.
Attorney for Defendant.

[Endorsed]: Filed Apr. 13, 1942. [27]

[Title of District Court and Cause.]

PRAECIPE OF APPELLANT FOR TRANS-
SCRIPT OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

You will please prepare and duly authenticate the following portions of the record in the above entitled cause for appeal of the appellant, heretofore allowed, to the United States Circuit Court of Appeals for the Ninth Circuit.

1. The Complaint and Petition of the Plaintiff.
2. The Motion of the Defendant to dismiss.
3. The Order of Dismissal.
4. Petition for Appeal.
5. Order Allowing Appeal.
6. Notice of Appeal.
7. Assignment of Error.
8. Affidavit of mailing copy of the Summons and Complaint to the Postmaster General.
9. Receipts by the Postmaster General of Registered copy of Summons and Complaint in this action.
10. Summons.
11. This Praecipe.

EDGAR S. HADLEY,
Attorney for Plaintiff.

Received a copy of the within Praeceptum this 13th day of April, 1942.

J. CHARLES DENNIS,

U. S. Atty.

Attorney for Defendant.

[Endorsed]: Filed Apr. 13, 1942. [28]

[Title of District Court and Cause.]

COST BOND

Defendant:

Know All Men by These Presents: That We, Byron J. Dolphin, sometimes known as B. J. Dolphin and Dolphin's Natural Barks, as Principal, and United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, authorized to do the business of surety in the State of Washington, as surety, acknowledge ourselves to be jointly indebted to George E. Starr, United States Postmaster at Seattle, King County, Washington, above named defendant, in the above entitled cause, in the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, conditioned that, whereas, on the 16th day of March, 1942, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in that court wherein Byron Barks, was plaintiff, and George E. Starr, United States Postmaster at

Seattle, King County, Washington, was defendant, a decree of dismissal was entered against the said plaintiff, and the said plaintiff having filed in the office of the Clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California.

Now, Therefore, the condition of the above obligation is such, that if the said Byron J. Dolphin, sometimes known as B. J. Dolphin, and Dolphin's Natural Barks, shall prosecute his appeal to effect and answer all costs, if the appeal is dismissed or by judgment affirmed, or all such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

Sealed with our seals and dated this 22nd day of April, 1942.

(Signed)

BYRON J. DOLPHIN

United States Fidelity and
Guaranty Company.

(Signed)

D. H. McCALLISTER,
Attorney-in-fact.

State of Washington,
County of King—ss.

On this 22nd day of April, 1942, before me personally appeared D. H. McCollister, to me known to be the Attorney-in-fact of the corporation that

executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

(Seal)

(Signed) M. GUY WORTHING,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Apr. 23, 1942

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD.

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 28, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel

filed and shown herein, as the same remain of record and on file in my office at Seattle, and that the same constitute the record on appeal herein from the Order of Dismissal entered by the Court on March 16, 1942, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Act. Feb. 11, 1925) for making record, certificate or return, 15 folios at 15c and 51 folios at 5c.....	\$ 4.80
Appeal Fee	5.00
Certificate of Clerk to Transcript.....	.50
	<hr/>
	\$10.30

I hereby certify that the above stated amount has been paid to me by the attorney for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 8th day of May, 1942.

JUDSON W. SHORETT,
Clerk, United States District
Court, Western District of
Washington.

By TRUMAN EGGER,
Deputy.

[Endorsed]: No. 10135. United States Circuit Court of Appeals for the Ninth Circuit. Byron J. Dolphin, sometimes known as B. J. Dolphin and Dolphin's Natural Barks, Appellant, vs. George E. Starr, United States Postmaster at Seattle, King County, Washington, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed May 11, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
9th Circuit.

No. 10135

BYRON J. DOLPHIN, Sometimes known as
B. J. Dolphin, and Dolphin's Natural Barks,
Plaintiff,

vs.

GEORGE E. STARR, United States Post-
master at Seattle, King County, Washington,
Defendant.

DESIGNATION OF POINTS ADOPTED
ON APPEAL

To the Clerk of the United States Circuit Court of
Appeals, 9th Circuit:

The Appellant here designates the Assignment

of Errors as appears in the record as covering all points to be argued in this case.

EDGAR S. HADLEY,
Attorney for Appellant.

Received a copy of the within Designation this 18th day of May, 1942.

J. CHARLES DENNIS,
Attorney for Defendant.

[Endorsed]: Filed May 19, 1942. Paul P. O'Brien,
Clerk.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

BYRON J. DOLPHIN, sometimes known as
B. J. DOLPHIN, and DOLPHIN'S NAT-
URAL BARKS,

Appellant,

vs.

GEORGE E. STARR, United States Postmas-
ter at Seattle, King County, Washington,

Appellee.

Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division

BRIEF OF APPELLANT

FILED

JUL 8 - 1942

PAUL P. O'BRIEN,
EDGAR S. HADLEY, CLERK
Attorney for Appellant.

405 LOWMAN BUILDING
SEATTLE, WASHINGTON

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BYRON J. DOLPHIN, sometimes known as
B. J. DOLPHIN, and DOLPHIN'S NAT-
URAL BARKS,

Appellant,

vs.

GEORGE E. STARR, United States Postmas-
ter at Seattle, King County, Washington,

Appellee.

Upon Appeal from the United States District Court
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Northern Division

BRIEF OF APPELLANT

EDGAR S. HADLEY,
Attorney for Appellant.

405 LOWMAN BUILDING
SEATTLE, WASHINGTON

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**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BYRON J. DOLPHIN, sometimes
known as B. J. DOLPHIN, and DOL-
PHIN'S NATURAL BARKS,

Appellant,

vs.

GEORGE E. STARR, United States
Postmaster at Seattle, King County,
Washington ,

Appellee.

No. 10135

**Upon Appeal from the United States District Court
for the Western District of Washington,
Northern Division**

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This action was brought by Byron J. Dolphin, also known as B. J. Dolphin and doing business as Dolphin's Natural Barks. Mr. Dolphin alleged in his complaint that he is a native born citizen of the United States and a resident of Seattle, King County, Washington, and engaged in business in Seattle, as set forth in the record, appellant's complaint on

page 2. The case was dismissed upon the finding of the court that the Postmaster General of the United States is a necessary party and the action could not be maintained against the local Postmaster (T. R. p. 24 & 25), and claimed no other jurisdictional question.

STATEMENT OF THE CASE

On the 21st day of May, 1941, the appellant Byron J. Dolphin received through the United States mails a citation containing a memorandum of charges, and requiring him to be and appear before the Solicitor for the United States Postmaster at Washington, D. C., on June 12, 1941, and show cause why a fraud order should not be issued against him. Appellant responded through his attorney and requested a transfer of the matter to Seattle, Washington, where he would have an opportunity to refute the charges of fraud on his part. This request was denied by the Solicitor of the Postoffice Department (T. R. p. 3). Mr. Dolphin responded in answer to the citation and furnished numerous statements by way of affidavit and letters from users of his product (T. R. p. 4).

On June 12, 1941, without the presence of Mr. Dolphin, who was unable to go to Washington, D. C., convey his witnesses there and make a proper showing, a hearing was had before the Solicitor, Vincent

M. Miles, where a Government chemist and a doctor of medicine testified. Their testimony was forwarded to Mr. Dolphin at Seattle, Washington, and rebuttal affidavits and letters and a denial of the statement made were forwarded to the Solicitor for the United States Postmaster. Mr. Dolphin's efforts were of no avail, and the Solicitor found B. J. Dolphin and Dolphin's Natural Barks to be fraudulent and recommended that a fraud order be issued against Dolphin's Natural Barks, Byron J. Dolphin and B. J. Dolphin (T. R. p. 18). The fraud order was issued by the Postmaster General under date of September 17, 1941, whereby the Postmaster at Seattle, George E. Starr, was directed to seize all mail coming through the Seattle Postoffice addressed to Byron J. Dolphin, B. J. Dolphin or Dolphin's Natural Barks (T. R. p. 19); whereupon this action was commenced in the United States District Court for the Western District of Washington, Northern Division. The defendants appeared and filed a Motion to Dismiss (T. R. p. 23). The court sustained the motion upon the ground that the Postmaster General of the United States was a necessary party, and that there was a want of necessary parties to the action (T. R. p. 25).

At the time of the commencement of the action, a copy of the complaint of the plaintiff was forwarded to the Postmaster General by registered mail, as shown by affidavit (T. R. p. 22). The only question

involved in this action is—can this action be maintained against the local Postmaster without joining the Postmaster General of the United States, to which the appellant excepted and has assigned the ruling of the Court as error (T. R. p. 27).

Under the order of the Postmaster General, as set forth (T. R. p. 19), the Postmaster at Seattle, Washington, George E. Starr, was directed to seize the mails of the appellant and directed it to be returned, marked “fraudulent,” to the writer, and if not able to return the same to the writer, to return it to the dead letter office at Washington, D. C. Therefore the Postmaster at Seattle is the one that is required to mark the mail fraudulent and return the same.

The complaint of the plaintiff further sets forth, and in Ex. “A” (T. R. p. 15) it is stated that the eyedrops advertised by the appellant as mentioned in the advertisements were advertised to include tumors, deep ulcers, *cancers* and sarcoma. The advertisement referred to appears in Ex. “A” (T. R. p. 13), and no mention is made of cancer or of any other things which are set forth in the opinion of the Solicitor as above cited. The appellant takes the position that the findings of the Solicitor were erroneous and not according to the facts as is disclosed in his findings; and also that the Postmaster at Seattle, George E. Starr, under the directions of the Postmaster General,

was the proper person to be named as defendant in this action.

ASSIGNMENT OF ERROR

The Court erred:

1. In sustaining the motion to dismiss, of the defendant, upon the ground that the Postmaster General was a necessary party defendant to the action, and that there was a want of necessary parties thereto (T. R. p. 25).

2. The Court erred in refusing to consider the facts alleged in appellant's complaint.

ARGUMENT

It is the position of the appellant that the Court erred in holding that the Postmaster General of the United States was a necessary party, and that the action could not be maintained against the Postmaster at Seattle, Washington.

Let it be understood that the Postmaster at Seattle, Washington, was acting under the direction of the Postmaster General, and that the acts of the Postmaster at Seattle were the acts that interfered with the appellant's business. It has been realized by the courts in the authorities hereafter cited, that the local Postmaster, acting under the directions of the Postmaster General, is the proper party against whom the action can be maintained. Without question,

to bring this action against the Postmaster General, it would have to be brought in Washington, D. C., many miles from the residence and place of business of the appellant, and that it is practically prohibitive for the appellant to go to Washington, D. C., and take his witnesses who would testify in his behalf. Washington, D. C., is something over 3000 miles from Seattle, Washington. However that may be, the weight of authority in the United States is to the effect that an action of this sort may be maintained against the local Postmaster.

One of the leading cases decided by our Supreme Court is the case of *American School of Magnetic Healing vs. McAnnulty*, 187 U. S. 94.

“In our view of these statutes the complainant had the legal right under the General Acts of Congress relating to the mails to have their letters delivered at the Postoffice as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders and money itself; all of which were their property as soon as they were deposited in the various postoffices for transmission by mail. * * * * * In other words, irreparable injury will be done to those complainants by the mistaken act by the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. * * * * * In such a case as the one before us there is no adequate remedy at law, the

injunction to prohibit the future withholding of the mail from complainants being the only remedy at all adequate to the full relief to which complainants are entitled." Such are the facts in the case at Bar.

This action was brought solely to restrain the withholding of the mails of the appellant and asking a review of the proceedings upon which the fraud order was issued.

In the case of Bailey Gaunce Oil and Refining Co. vs. Duncan, *10 Fed. Suppl. 281*, it was held that the Court had jurisdiction where the action was brought against the local Postmaster and that the Postmaster General was not a necessary party to an action of this nature. We quote:

"I do not believe appeal to the jurisdiction can be sustained. Numerous other cases have been prosecuted in the identical way, that is, against the local Postmaster, who has been ordered to refuse the use of the mails; and, so far as I have been able to find, this is the first time the Postmaster General has seen fit to urge this point. The order or ruling is at least quasi-judicial in its nature, required to be made on evidence "satisfactory" to the Postmaster General and has the effect of a judgment or decree denying to the citizen a very substantial right and from which there is no appeal except to the courts, as has been

done in this instance. The Postmaster is the instrumentality for its execution, just as the Sheriff is of a court, and no one would contend that the latter officer was not the proper person to enjoin from the execution of a nul judgment instead of the court which had rendered it."

In the case of *Roode vs. Goodman*, 83 Fed. 2nd, page 28, 5th Circuit, "The Postmaster, upon information satisfactory to him that a postoffice is being used to carry on a fraudulent scheme, may, of course, issue a fraud order, but until a valid fraud order is issued against him a citizen of the United States has, under the laws as they now stand, not a mere privilege, but a right, to use the mails, and in the course of regular deliveries, to receive mail sent to him. When, then a Postmaster is unlawfully withholding delivery, the owner of the mail has a right to proceed against the Postmaster to prevent that wrongful interference with his property and his rights. This is not a case in which the plaintiff is attempting to compel a subordinate official to exercise a discretion which only his superior can exercise, it is a case in which an official is acting affirmatively against a plaintiff, by seizing his mail, and preventing its delivery. It is that affirmative action which the suit seeks to enjoin.* * * * *

"There have been some civil suits over fraud orders brought against a Postmaster General, but most of

the suits of that kind have been brought and maintained against the local Postmaster, (Citing cases) and other cases without number. It is only reasonable, and in only two district court cases, that it has been claimed that the Postmaster General is an indispensable party to such suit. * * * * (Citing cases).

“If the position the government takes that the Postmaster General is an indispensable party to these suits were sound, all of these suits should have been brought in Washington, for process will not run to sue the Postmaster General elsewhere”, (Cite authority) but if we assume in this case that the Postmaster General, brought as a party to this suit, was indispensable to grant the plaintiff full relief and that the District Judge ought not to have entered a decree against the local Postmaster because of the absence of the Postmaster General from this suit, it does not follow that the decree appeal from here may not stand. The defect of want of parties does not go to the jurisdiction of the court to entertain the suit. It goes into its discretion as a court of equity to entertain it. When it plainly appears that no prejudice has been done to the absent party by the decree as to the parties before it is right and completely effective, it ought to stand and the litigation come to an end.”

Other cases are here cited, holding to the same point. In the case of *State of Colorado vs. Toll*,

Superintendent of the Rocky Mountain National Park, (268 U. S. p. 228), the same question was raised as was raised in this case. The court there held that there was no question that a bill in equity is a proper remedy, and that it may be brought against the defendant without joining his superior officer.

We also cite to the same effect:

Crane vs. Nichols, 1 Fed. 2nd, 936; 34 A. L. R. 1289.

Leach vs. Carlisle, 258 U. S. 138; 66 Law Ed. 511.

Oycoch vs. O'Brien, 28 Fed. 2nd, 817.

Public Clearing House vs. Coyne, 194 U. S. 497; 48 Law Ed. 1092.

Regal Drug Co. vs. Wardell, 260 U. S. 386; this case from the 9th Circuit.

We recognize that there are some cases that hold that the Postmaster General is a necessary party, but upon consideration of the facts as stated, they are not in point with the best reasoning. There can be no question that to require a person against whom a fraud order has been issued to bring any action that he may desire against the Postmaster General, will deprive them of their rights as American citizens to pursue the course of happiness and to continue a business in a legitimate way. Exh. "A," as set forth in the plaintiff's complaint (T. R. p. 9).

It is conclusive that a fair hearing was not had before the Solicitor for the Postmaster General. As

said in our statement, the circular which they introduced, claiming that it was being used by Mr. Dolphin in the sale of his remedy, had not been used for a year and they knew it.

They also charged him with advertising that he could cure cancer, which is not brought out by any testimony. The circular in question made no reference to cancer. They refused to consider affidavits and letters testimonial, and the statements of naturopaths and chiropractors. If they had been willing to take their testimony in Seattle, where the appellant could have made a showing, there would have been no fraud order issued. In fact the entire record is devoid of facts that would show fraud upon the part of the appellant.

SUMMARY AND CONCLUSIONS

Courts have consistently held, that at least as to medical preparations, a distinct difference exists between statements of fact and expressions of opinion by persons qualified to express them concerning the curative qualities of such preparations. In this connection the medical doctor who testified, had never used the remedy of Mr. Dolphin; he had never analyzed it and in fact knew nothing about it, yet his testimony was taken by the Solicitor for the Postmaster General as authentic. Consideration of the pamphlet introduced and hereinabove referred to and

claimed to be used by Mr. Dolphin, sets forth no claim upon which any fraud could be based unless it be shown that the statements were false, and that was not done.

Under the authorities cited and under the circumstances, we are confident that it was proper to bring this action against the Postmaster at Seattle, and that he was a proper party, and the Postmaster General was not a necessary party.

THEREFORE we respectfully submit that this appeal should be sustained, and the cause remanded to the United States District Court for the Western District of Washington, Northern Division, for a hearing upon its merits.

Respectfully submitted,

EDGAR S. HADLEY,

Attorney for Appellant.

No. 10135

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BYRON J. DOLPHIN, sometimes known as
B. J. DOLPHIN, and DOLPHIN'S
NATURAL BARKS,

Appellant,

vs.

GEORGE E. STARR, United States
Postmaster at Seattle, King County,

Appellee.

Washington,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

GERALD SHUCKLIN
Assistant United States Attorney

Attorneys for Appellee.

FILED

JUL 16 1942

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE.
SEATTLE, WASHINGTON.

No. 10135

IN THE
United States
Circuit Court of Appeals
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BYRON J. DOLPHIN, sometimes known as
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NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS
United States Attorney

GERALD SHUCKLIN
Assistant United States Attorney

Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURT HOUSE.
SEATTLE, WASHINGTON.

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IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

BYRON J. DOLPHIN, sometimes known as
B. J. DOLPHIN, and DOLPHIN'S
NATURAL BARKS,

Appellant,

vs.

GEORGE E. STARR, United States
Postmaster at Seattle, King County,

Appellee.

Washington,

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF THE CASE

On September 17, 1941, the Postmaster General issued a "fraud" order finding that Dolphin's Natural Barks, Byron J. Dolphin, B. J. Dolphin, and their officers and agents at Seattle, Washington, were

engaged in conducting a scheme or device for obtaining money through the mail by means of false and fraudulent pretenses, representations and promises in violation of Sections 259 and 732, Title 39, United States Code (Tr. 9). The order forbade the payment of any Postal money order drawn to the order of said concerned parties, and that all letters and other mail matter were to be returned by the Postmaster at the offices at which they were originally mailed and to be delivered to the senders with the words "Fraudulent; Mail to this Address returned by order of Postmaster General."

In an action filed in the United States District Court at Seattle, Washington, appellant sought to have the Court review the action of the Solicitor General of the Post Office Department and the Postmaster General. The prayer of the complaint asked that Postmaster George E. Starr, of Seattle, Washington, be restrained from in any manner enforcing the order of the Postmaster General of September 17, 1941 (Tr. 2-8). George E. Starr, Postmaster at Seattle, Washington, was the only party defendant named in the action; the Postmaster General was not made a party defendant. A motion to dismiss was interposed on behalf of the local Postmaster (Tr. 23) and the District Court entered an order of dismissal

(Tr. 25), from which appellant appeals.

The order of dismissal was based on the fact that the acts alleged to have been done by the Postmaster at Seattle were done at all times only pursuant to the directions and instructions of the Postmaster General of the United States of America, under the terms of the "Fraud Order," and that it further appeared the Postmaster General of the United States was a necessary party. The Court found there was want of a necessary party and therefore ordered a dismissal of the action (Tr. 25).

ARGUMENT

The issues in this case have been recently passed upon in this circuit in *Neher v. A. E. Harwood, Postmaster*, No. 10042, decided June 5, 1942. This case is so recent and discusses with so great detail the exact question here that it is only necessary to cite this authority to the Court. The conclusion reached is that the Postmaster General is an indispensable party in an action of this kind; that the lower court was correct in dismissing the action. Other cases on which appellee relies and which are cited in *Neher v. Harwood, supra*, are as follows:

Warner Valley Stock Co. vs. Smith,
165 U. S. 28;

Webster vs. Fall, 266 U. S. 507;

Moody vs. Johnston, 66 Fed. (2d) 999;
Moore vs. Anderson, 68 Fed. (2d) 191;
*National Conference on Legalizing Lotteries, Inc.,
vs. Goldman*, 85 Fed. (2d) 66;
*Association for Legalizing American Lotteries,
Inc.*, 85 Fed. (2d) 67;
Golden Stakes Advertising Co. vs. Goldman,
85 Fed. (2d) 68.

CONCLUSION

Appellee respectfully represents that the decision of the lower court should be affirmed.

Respectfully submitted,

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